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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1301.

THE UNITED STATES EX REL. AMASA A. REDFIELD, PLAINTIFF IN ERROR,

vs.

WILLIAM WINDOM, SECRETARY OF THE TREASURY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 24, 1890.

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1 *Petition for Mandamus, Affidavit, & Exhibits A, B, & C. Filed Dec. 23, 1889.*

In the Supreme Court of the District of Columbia, December 23, A. D. 1889.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD *vs.* WILLIAM WINDOM, Secretary of the Treasury. } No. 30207.

To the honorable the supreme court of the District of Columbia:

1. Your relator, Amasa A. Redfield, respectfully represents that he is a resident of the city and State of New York and assignee of the property of William Mitchell, a judgment debtor, as will more fully and at large hereinafter appear.

2. That the respondent, William Windom, is the Secretary of the Treasury of the United States, having the custody and control of the drafts hereinafter mentioned.

3. That said William Mitchell, on or about the 3d day of September, 1886, entered into a contract with the United States to furnish material and perform labor for the Life-Saving Service, and in pursuance of said contract said Mitchell did furnish certain material and perform certain labor, to wit, in the construction and repair of seven houses on the coast of Long Island, in the State of New York.

4. That the account rendered by said Mitchell for furnishing said material and performing said labor was adjusted on the 11th day of February, 1888, by the Treasury Department, and the amount found to be due to said Mitchell of $12,536 for the construction and repair of said houses on the coast of Long Island, as will appear by a letter from the commissioner of customs to said Mitchell in words and figures as follows:

2 TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF CUSTOMS,
WASHINGTON CITY, D. C., *February* 13, 1888.

Mr. William Mitchell, No. 24 State street, New York city.

SIR: An account has been adjusted in your favor in the amount of $12,536, being due for furnishing the materials and labor and making additions and alterations to seven (7) life-saving station-houses located on the coast of Long Island, N. Y., under contract dated September 3, 1886. Draft will be remitted.

Respectfully yours,
(Signed) JOHN S. McCALMONT,
Commissioner of Customs.

5. Your relator is advised and therefore avers that, the said account having been so adjusted, nothing remained to be done in that behalf by the Treasury Department, its officials, or any officer or

agent of the Government but the purely ministerial duty of issuing a warrant and the remittance of a draft to said Mitchell for the amount so found to be due and payable.

6. That a draft dated February 15, 1888, and numbered 11130, for $12,536.00, payable to the order of said William Mitchell, was accordingly issued by the Treasury Department, but, instead of being delivered to said Mitchell or the amount thereof paid to him, said draft was sent to one Captain Moore, superintendent of construction and repairs of the Life-Saving Service at New York, who was instructed by the Treasury Department, as your relator is
3 informed and believes and therefore avers, not to deliver said draft or pay its amount to said Mitchell until said Mitchell should pay certain claims and demands presented against him at the Treasury Department by persons alleging his indebtedness to them for material and labor, as will appear by reference to a true copy of the examination of said Mitchell in supplementary proceeding under the laws of New York in the suit of Patterson Brothers against said Mitchell, filed as a part hereof and marked Exhibit A, and to be hereinafter more particularly referred to; and your relator is advised and believes and therefore avers that there was and is no discretion residing in the respondent, the said Windom, or in any of the officers of the Government as to the delivery of said draft, and that neither the respondent nor any of the officers of the Treasury Department have or have had any right or authority to interfere with the private affairs of said Mitchell or to attempt to adjust or settle alleged claims against him, and that such attempt was and is a violation of the rights of said Mitchell and of his lawful assignee, your relator.

7. Your relator is advised and therefore avers that said Captain Moore, superintendent as aforesaid, acting in pursuance of his said instructions from the Treasury Department, did not deliver the said draft to said Mitchell, but returned the same to the Treasury Department, where it now is in the charge, custody, and control of respondent, who refuses for the reasons hereinafter set forth, and no other, to deliver the same to your relator; and your relator further avers that neither said Mitchell nor his lawful assigns, your relator, nor any one else acting for and in behalf either of said Mitchell or your relator have ever received said amount of $12,536 from the United States or any part of the same.

8. Your relator is informed and believes and therefore avers that the said claims and demands are unlawful, outrageous, and
4 unjust, and amount in the aggregate to the sum of $12,503—that is to say, to within $33 of the amount of said draft—and that even if they were not unlawful and unjust, as aforesaid, your relator, nevertheless, under the terms of his assignment, has no authority to pay said claims and demands, and that even if he had such authority he has no means wherewith to pay the same until the said draft shall be delivered to him.

9. Your relator further avers that the said amount of $12,536 is justly due and owing by the United States to the said Mitchell or his lawful assigns for the work done and material furnished as afore-

said; that there is no mistake or error of any sort or kind in his accounts as adjusted as aforesaid by the accounting officers of the Treasury Department, but that the said adjustment of his said accounts are absolutely correct in every particular, and the amount found to be due thereby is the full sum of $12,536, and that the respondent does not in any way aver or set up as a reason for not delivering said draft to your relator that the said adjustment is not in every way correct, nor that the amount found to be due thereunder is not now lawfully due and payable to your relator as the lawful assignee of said Mitchell, as hereinafter set forth; and your relator, on information and belief, avers that the said Windom's refusal to deliver said draft to your relator or to cause the same to be delivered to him is based upon no other ground and founded upon no other reason than that the said Mitchell and your relator have refused and still refuse to pay the said claims and demands mentioned in the 6th paragraph of this petition.

10. Your relator further represents that on or about the 27th day of February, 1888, said Mitchell was examined in supplementary proceedings, under the laws of New York, at the instance of certain of his judgment creditors, namely, the firm of Patterson Brothers, and that on said examination, as required by law, said Mitchell set forth the indebtedness of the United States to him, as hereinbefore stated, and also the circumstances detailed by your relator in relation to the detention from him of the draft aforesaid, and said Mitchell also admitted his indebtedness to said Patterson Brothers, judgment creditors, and reference is made to a true copy of the proceedings on said examination (Exhibit A), filed herewith as hereinbefore stated.

11. Your relator further represents that on or about the 27th day of February, 1888, in the supreme court of the city and county of New York, in the said suit of Patterson Brothers against the said William Mitchell, your relator was appointed receiver of all the property, debts, equitable interests, rights and things in action, effects and estate, real and personal, of the said William Mitchell, judgment debtor in said suit, and your relator has duly qualified as required by the order appointing him, and your relator is advised and therefore avers that by virtue of said order appointing him receiver and the assignment thereafter made and referred to in the next paragraph of this petition he is entitled to demand and receive and take charge of said draft for $12,536.

12. Your relator further represents that the said William Mitchell, for the purpose of enabling your relator to demand and receive said draft of $12,536 and apply, according to the order appointing him receiver, the proceeds thereof for the benefit of said Mitchell's creditors, made and executed to your relator an assignment of said draft, the said draft being for $12,536, dated February 15, 1888, and drawn to the order of said Mitchell by the Treasurer of the United States, and numbered 11130, and by the said assignment gave to your relator full power and authority to ask for, demand, and receive the said draft or the amount thereof, and your relator files

herewith a copy of said assignment, marked Exhibit B, to be read and taken as a part hereof.

13. And your relator is advised by his counsel that said assignment is valid under the laws of the United States, having
6 been made and executed after the issuing of the said draft, and that, even if it were not so made and executed, it is valid and lawful as a transfer for the benefit of creditors; and your relator avers that he is entitled, by virtue of the assignment aforesaid, to the custody and possession of the draft in question.

14. And your relator further shows that the said assignment, being for the benefit of creditors, is not within the purview of the act of Congress approved February 26, 1853, and therefore was not required to be executed in the presence of two witnesses or to be acknowledged in accordance with the provisions of said act; but your relator, fearing that some objection might be taken or point made by reason of the same not being so witnessed and acknowledged, procured from the said Mitchell a further assignment of the said draft and caused the same to be executed and acknowledged in strict conformity with said act of 1853, a true copy of which assignment your relator caused to be filed in the Treasury Department, and your relator files also with this petition a true copy of said additional assignment, marked Exhibit C, which he prays may be read and taken as a part hereof.

15. And your relator further shows that the respondent, the said Windom, arbitrarily refusing, for the reasons aforesaid and no other, to deliver to your relator the said draft, after due demand made upon him by your relator for the same, instituted a proceeding in this court on the 11th day of July, 1889, known and numbered on the records of this court as law No. 29834, to obtain a writ of mandamus against the said Windom, commanding him to deliver to your relator the aforesaid draft; but that on the hearing of said proceedings before the general term of this court it was held that it did not appear in the proceedings with sufficient certainty that the reason alleged to have been given by the said Windom for refusing to deliver said draft to your relator was the only reason for his withholding the same, and therefore the said proceedings were dis-
7 missed; but in the opinion of the court rendered upon the decision in said proceeding, the learned judge delivering said opinion, and speaking for the court, used the following language:

"We feel that we ought to make a single remark about the reason alleged to have been given by the Secretary of the Treasury for not delivering this draft. It is alleged that it is withheld until Mitchell shall pay the sub-contractors to whom he was indebted. We think that we ought to say that is not a matter with which the Secretary had any concern. As an executive officer he was competent to act upon the relations between Mitchell and the United States. After determining these he could not charge himself with duties or assume control which had reference to private rights. In these mandamus cases the Supreme Court has acknowledged the importance of the courts keeping its hands off of subjects that were purely executive,

so as not to interfere with another department of the Government, and it would seem to be equally important that the executive should not undertake to perform judicial functions outside of the particular matter with which it is charged."

16. And your relator, hoping that this deliberate announcement of the law governing the rights of your relator in regard to said draft would be respected by the said Windom, and that he would thereupon no longer withhold the same from your relator, again applied to said Windom for the said draft and demanded the same of him; but that the said Windom, notwithstanding said opinion, although the same was read to him by your relator's counsel, as your relator is informed and believes, still continues to defy the requirements of law and arbitrarily refuses to deliver said draft to your relator, although having no other reason for said refusal than that already stated by your relator.

17. That your relator is aggrieved by the said neglect and
8 arbitrary refusal of the said Windom to deliver or cause to be delivered to him the said draft, of the possession of which he is by the said Windom deprived without authority of law, and your relator is entirely without remedy in the premises unless it be now afforded by the interposition of this honorable court by its writ of mandamus.

18. Your relator therefore prays that a writ of mandamus may issue against the Honorable William Windom, Secretary of the Treasury, who is the respondent herein, commanding him to deliver or cause to be delivered to your relator the said draft No. 11130, for the sum of $12,536.00, or show cause to the contrary at an early date, and that such other order may be made in the premises as law and justice may require.

AMASA A. REDFIELD.

FRANKLIN H. MACKEY,
Attorney for Relator.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Amasa A. Redfield, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated upon my own knowledge are true, and the facts therein stated on information and belief I believe to be true.

AMASA A. REDFIELD.

Subscribed and sworn to before me this 16th day of December, 1889.

JOSEPH B. BRAMAN,
[SEAL.] *Notary Public, City and County of New York.*

9 U. S. *ex Rel.* A. A. REDFIELD
vs.
WINDOM.

RELATOR'S EXHIBIT A. Filed Dec. 23, 1889.

Supreme Court, City and County of New York.

PATTERSON BROTHERS, Plaintiffs,
vs.
WILLIAM MITCHELL, Defendant.

William Mitchell, the judgment debtor, having been duly sworn by his honor Edward Patterson, said William Mitchell having appeared and his default having been opened, in answer to questions says:

I am William Mitchell, the judgment debtor above referred to, and also referred to in the order in these proceedings. My business is that of builder, and my office is at No. 34 State street, in the city of New York. I never was examined in supplementary proceedings or in proceedings in aid of execution before, and I never had a receiver of my property appointed, and I never made a general assignment of my property. I have been doing work for the United States Government during the past year, viz., seven houses on the
10 coast of Long Island and nine houses on the coast of Massachusetts. There is a balance due me on the Long Island houses of twelve thousand five hundred and thirty-six and $\frac{00}{100}$ dollars ($12,536.00) from the United States Government and of two thousand five hundred and ten and $\frac{38}{100}$ dollars ($2,510.38) due from the United States Government on the Massachusetts houses. I called on the Assistant Secretary of the United States Treasury, Judge Manard, and he informed me that my claims were audited, and that he had instructed the superintendent of the Life-Saving Service to forward a check for twelve thousand five hundred and thirty-six dollars ($12,536.00) to Captain Moore, at 34 State street, New York city, which check was drawn to my order and to be turned over to me, when certain memoranda claims were adjusted, that were filed with the Treasury Department, in Washington, D. C. I said to him that I was under no obligation to these persons who had filed said statements until I had received my money from the United States Treasury, as I had in
11 all cases complied with my contract with them. He said that the Department had no disposition to settle my private business, but he took this course to *to* save the Department the annoyance of receiving and answering letters of people with whom the Department had no official connection, and he hoped by this plan that I would be able to adjust my private business in New York, and then to receive my check from Captain Moore. I told him that some of these statements were filed for more than twice the amount of my indebtedness, and I could not and would not pay them and should not recognize any claims filed in this manner. I have declined to turn this Treasury warrant over to Patterson Brothers for the reason that the same is tied up in this manner.

The following is a copy of a letter received from the Treasury Department in reference to said draft :

12 "F. L. H.
In your reply please quote above initials.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF CUSTOMS,
WASHINGTON CITY, D. C., *February*, 13, 1888.

Mr. William Mitchell, No. 34 State St., New York city.

SIR: An account has been adjusted in your favor in the amount of $12,536,00, being due you for furnishing the materials and labor and making additions and alterations to seven (7) life-saving station-houses located on the coast of Long Island, N. Y., under contract dated Sept. 3rd, 1886. Draft will be remitted.

Respectfully yours,
(Signed) JOHN S. McCALMONT,
Commissioner of Customs.
L."

Said letter is endorsed :

"TREASURY DEPARTMENT,
OFFICE OF COMMISSIONERS OF CUSTOMS,
WASHINGTON, D. C., *Feb'y 13th*, 1888.

13 John S. Calmont, commissioners of customs, states am't due for materials, labor, &c., furnished under contract dated Sept. 3, 1886."

I called on Captain Moore, No. 34 State street, New York city, February 15th, 1888. Captain Moore is the superintendent of construction and repairs of life-saving stations for the United States, and he informed me that he had the above mentioned and described warrant in his possession, but he declined to pay it over to me. I demanded it of him and showed him the above letter. He has not paid it to me nor any part of it, and the United States Government is still indebted to me for the full amount of said warrant. I am still indebted to Patterson Brothers for the full amount of their judgment.

WILLIAM MITCHELL.

Sworn and subscribed to before me this 27th day of February, 1888.

EDWARD PATTERSON.

A motion having been made by the plaintiff in this action
14 at the close of the above examination for the appointment of a receiver of the property of the judgment debtor, William Mitchell, I hereby order that A. A. Peafield, Esq., of the city of New York, be appointed such receiver upon filing a bond for the sum of $5,000, pursuant to the statute in that behalf provided.

EDWARD PATTERSON, *J. P.*

Supreme Court, City and County of New York.

PATTERSON BROTHERS, Plaintiff-,
against
WILLIAM MITCHELL, Defendant. } Order Appointing Receiver.

An order in proceedings supplementary to execution upon the judgment in this action having been issued and made returnable before me, as prescribed in article 1 of title 12 of chapter 17 of the Code of Civil Procedure, and an examination having been had
15 thereunder before me of William Mitchell, the judgment debtor, and it appearing from the oath of said William Mitchell, the judgment debtor, that there is not pending against the said William Mitchell, the judgment debtor, any action of the character specified in article 1 of title 4 of chapter 15 of the Code of Civil Procedure, brought by Patterson Brothers, as plaintiffs, and there is not pending against the said William Mitchell, the judgment debtor, and special proceeding instituted as prescribed in article 1 of title 12 of chapter 17 of part 2 of the Code of Civil Procedure against the said William Mitchell, the judgment debtor herein;

And it also appearing by the like proof that no receiver of the property of the said William Mitchell, the judgment debtor, has been appointed in any such action or proceeding, and an application for the appointment of a receiver herein having been made by the plaintiff- at the close of the examination of said judgment debtor—

I do hereby order that Amasa A. Redfield, Esq., of the city of New York, be appointed, and I do hereby appoint him, receiver of
16 all the property, debts, equitable interests, rights and things in action, effects, and estate, real and personal, of the said William Mitchell, the judgment debtor herein; that the said receiver before entering upon the execution of this trust under this order execute and duly acknowledge his bond, with at least two sufficient sureties, to be by me approved, to the people of the State of New York in the penalty of five thousand dollars and conditioned for the faithful discharge of his duties as such receiver, and that upon filing such bond and filing and recording this order in the office of the clerk of the city and county of New York the said receiver be invested with all the rights and powers as such according to law.

And I do hereby order and direct the said William Mitchell, the judgment debtor herein, to execute, acknowledge, and deliver to the said receiver a good and sufficient deed and conveyance of all his real estate, whatsoever the same may be.

And I do further order that there be allowed to Patterson
17 Brothers, the judgment creditor- herein, the sum of — as costs and disbursements, and do direct that the same be paid by the said receiver out of any money which may come into his hands by virtue of his appointment as receiver herein.

And the said William Mitchell, his agents, servants, and attorneys, and all others are hereby forbidden, enjoined, and restrained from making or suffering any transfer or other disposition of or interference with the property, not exempted from seizure by section

2463 of the Code of Civil Procedure, belonging to the said judgment debtor, William Mitchell, or in which he is in anywise interested, except in obedience hereto, until further direction in the premises.

Dated February 27th, 1888.

U. S. *ex Rel.* REDFIELD
vs.
WINDOM.

RELATOR'S EXHIBIT B.

Assignment.

Know all men by these presents that I, William Mitchell, of Fort Hamilton, New York, for value received, have sold, and by these presents do grant, assign, and convey, unto Amasa A. Redfield, receiver, &c., duly appointed by Hon. Edward Patterson, jus-
18 tice, by an order made in the case of Patterson Brothers against William Mitchell, dated February 27, 1888, a certain draft drawn to my order by the Treasurer of the United States for the sum of $12,536, said draft being dated February 15, 1888, and numbered 11130; also all moneys due me from the United States Treasury for the work done on United States life-saving stations, said moneys due now represented by said draft; also by other moneys due me on said work and withheld by the United States Treasury:

To have and to hold the same unto the said Amasa A. Redfield, receiver, &c., his successors and assigns forever, to and for the use of and to carry out the purposes and duties of said receivership in conformity with the said order, under and by virtue of which said receiver was appointed, hereby constituting and appointing said Amasa A. Redfield, receiver, &c., true and lawful attorney, irrevocable, in name, place, and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover, and receive all such sum and sums of money which now are or may hereafter become due, owing, and payable for or on account of all or any of the accounts, dues, debts, and demands above assigned, giving and granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal the fifteenth day of March, one thousand eight hundred and eighty-eight.

WILLIAM MITCHELL. [L. S.]

Sealed and delivered in the presence of—

J. B. SABINE.

19 STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this 15th day of March, in the year one thousand eight hundred and eighty-eight, before me personally appeared William Mitchell, to me known to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

J. B. SABINE,
Notary Public, Kings County.

Cert. filed N. Y. Co.

U. S. *ex Rel.* REDFIELD }
vs.
WINDOM. }

RELATOR'S EXHIBIT C. Filed Dec. 23, 1889.

Know all men by these presents that I, William Mitchell, of Fort Hamilton, New York, for value received, have sold, and by these presents do grant, assign, and convey, unto Amasa A. Redfield, receiver, &c., duly appointed by Hon. Edward Patterson, justice, by an order made in the case of Patterson Brothers against William Mitchell, dated February 27th, 1888, a certain draft drawn to my order by the Treasurer of the United States for the sum of twelve thousand five hundred and thirty-six dollars, said draft being dated February 15th, 1888, and numbered 11130; also all moneys due me from the United States Treasury for the work done on the United States life-saving stations, said moneys due now represented by said draft; also by other moneys due me on said work and withheld by the United States Treasury:

To have and to hold the same unto the said Amasa A. Redfield, receiver, &c., and assigns forever, to and for the use of and to carry out the purposes and duties of said receivership in conformity with the said order, under and by virtue of which said receiver was appointed, hereby constituting and appointing said Amasa A. Redfield, receiver, &c., my true and lawful attorney, irrevocable, in my name,
place, and stead, for the purposes aforesaid, to ask, demand,
20 sue for, attach, levy, recover, and receive all such sum and sums of money which now are or may hereafter become due, owing, and payable for or on account of all or any of the accounts, dues, debts, and demands above assigned, also authorizing and empowering said Amasa A. Redfield to receive said draft and to endorse the same in my name, place, and stead, giving and granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal the

fifteenth day of March, one thousand eight hundred and eighty-eight.

WILLIAM MITCHELL. [L. S.]

Sealed and delivered in the presence of—

C. E. TALBOTT.
FRED. WILLETS.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

On the thirty-first day of October, in the year one thousand eight hundred and eighty-nine, before me personally appeared William Mitchell, to me known and known to me to be the person mentioned and described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same, and I hereby certify that, at the time of the acknowledgment, I read and fully explained to said William Mitchell the within assignment before he executed the same.

S. M. HAYWARD,
Notary Public.

Kings Co. cert. filed in N. Y. Co.

21 *Court Proceedings.*

Proceedings before the supreme court of the District of Columbia, holding a circuit court and special term in and for said District, commencing the third Monday, it being the 21st day, of October, A. D. 1890.

MONDAY, *October* 21*st*, *A. D.* 1890.

By order of Martin V. Montgomery, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

22 MONDAY, *December* 23*rd*, *A. D.* 1890.

Session resumed pursuant to adjournment. Montgomery, justice, presiding.

* * * * * * *

THE UNITED STATES *ex Rel.* AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } At Law. No. 30207.

On consideration of the petition of the relator it is, this 23rd day of December, 1889, ordered that the respondent, William Windom, Secretary of the Treasury, show cause on or before the 15th day of January, 1890, why the writ of mandamus should not issue as prayed for in said petition, provided a copy of this order be served on the respondent on or before the 1st day of January, 1890.

M. V. MONTGOMERY, *Justice.*

Marshal's Return.

Served copy of the within order on William Windom, Secretary of the Treasury, Dec'r 24th, 1889.

D. M. RANSDELL, *Marshal.*

23 *Stipulation. Filed Jan'y* 14, 1890.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury.

It is hereby stipulated that the petition for a writ of mandamus and the rule to show cause, made on the 23d day of December, 1889, shall be taken as and be considered an alternative writ of mandamus herein.

JOHN BLAIR HOGE,
U. S. Attorney for Dist. of Columbia, Solicitor for Respondent,
By CHARLES H. ARMES, *His Assistant.*
FRANKLIN H. MACKEY,
Solicitor for Relator.

Jan'y 14, 1890.

24 *Demurrer to Petition for Mandamus. Filed Jan'y* 14, 1890.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } At Law. No. 30207.

The respondent says that the petition filed in the above-entitled cause and the rule to show cause, which are considered as an alternative writ of mandamus herein, and the matters therein contained are not sufficient in law to warrant the issuing of the writ of mandamus as prayed in said petition, and that the said respondent is not bound by law to answer the same.

JOHN BLAIR HOGE,
Attorney of the United States for the District of Columbia,
By CHARLES H. ARMES,
His Assistant, Solicitor for Respondent.

25 NOTE.—One of the matters of law to be argued upon the above demurrer is that this honorable court has not jurisdiction to compel the Secretary of the Treasury to pay out money of the United States on a demand which has not received the sanction

of Congress nor been adjudicated in a court having jurisdiction to hear and determine suits against the United States.

JOHN BLAIR HOGE,
U. S. Attorney, D. C.,
By CHARLES H. ARMES,
His Assistant, Solicitor for Respondent.

Joinder in Demurrer. Filed Jan'y 16, 1890.

In the Supreme Court of the District of Columbia, the 16th Day of January, 1890.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } At Law. No. 30207.

26 The relator says that the petition filed in the above-entitled cause and the rule to show cause, which are considered as an alternative writ of mandamus herein, and the matters therein contained are sufficient in law to warrant the issuing of the writ of mandamus as prayed in said petition, and that the said respondent is bound by law to answer the same; and he therefore craves judgment that the peremptory writ of mandamus shall issue herein, notwithstanding the demurrer of the respondent.

FRANKLIN H. MACKEY,
Att'y for Relator.

Stipulation as to Amendment of Petition. Filed Jan'y 17, 1890.

In the Supreme Court of the District of Columbia.

U. S. *ex Rel.* REDFIELD
vs.
WILLIAM WINDOM, Sec'y of the Treasury. } At Law. No. 30207.

27 By agreement of counsel for the relator and respondent, the petition may be considered, as of the date of the filing of said petition, amended as follows, viz., by inserting at the end of the fifth paragraph the following words:

"Your relator further avers that a general appropriation was made by act of Congress to provide for the payment of work to be done in the building and repairing of life-saving stations prior to the performance of the work done under the said contract of September 3rd, 1886, and that there is sufficient money now in the Treasury of the United States applicable to the payment of the said work so done under said contract."

FRANKLIN H. MACKEY,
Att'y for Relator.
C. H. ARMES,
Ass't Att'y U. S., D. C., Att'y for Respondent.

Order Referring Cause to General Term, January 16, 1890.

In the Supreme Court of the District of Columbia, the — Day of January, 1890.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury.
} At Law. No. 30207.

28 The motion for judgment that the peremptory writ of mandamus issue in this cause, notwithstanding the demurrer, is hereby, this 16th day of January, 1890, ordered to be heard in the general term in the first instance.

M. V. MONTGOMERY, *Justice, &c.*

Motion to Advance Cause for Hearing. Filed Mar. 19, 1890.

In the Supreme Court of the District of Columbia.

U. S. *ex Rel.* REDFIELD
vs.
WM. WINDOM.
} Law, No. 30,207. In Mandamus.

Now comes the relator and moves the court to set an early day for the hearing of this cause.

FRANKLIN H. MACKEY,
Att'y for Relator.

For cause of the above motion the relator shows that the above cause, involving some $15,000, has been practically pending in this court since August last; that under the decisions of the Supreme Court of the United States the practice is to give immediate hearing to mandamus cases against departmental officials.

29 *Proceedings in General Term.*

MONDAY, *April 7th*, 1890.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, April 7th, 1890.

Present, presiding: Justices Hagner and James; Justice Cox absent holding equity court, and chief justice holding criminal court.

WEDNESDAY, *April* 7, 1890.

Session resumed pursuant to adjournment, & present Justices Hagner, James, & Cox.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } Law, No. 30207.

This cause coming on to be heard in general term in the first instance upon the demurrer of the respondent, and having been argued by counsel and considered by the court, it is, this 7th day of May, A. D. 1890, ordered and adjudged that the said demurrer be, and the same is hereby, overruled, and the said respondent is allowed ten days to make return to the alternative writ.

CHARLES P. JAMES, *Justice.*

Supreme Court of the District of Columbia. In General Term.

THE UNITED STATES at the Relation of AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury.

1. The judicial department of the Government cannot by the writ of mandamus control the executive department, but it may constrain the individual who is charged with a duty therein to proceed with its performance in case he neglects or refuses to act. It (the writ) is a proceeding against the individual as a person in default, its object being to require him to perform an official duty imposed upon him by law.
2. If the duty in question involves the exercise of discretion as to how he shall act or decide he cannot be required by this writ to do anything more than go on with his discretionary work and to decide.
3. But if it is to do a particular act which no longer involves the exercise of power to examine and of discretion as to his decision or mode of action, then he may be compelled by mandamus to do the particular thing remaining to be performed.
4. Where, under section 191 R. S. U. S., the commissioner of customs has certified a balance to be due a creditor of the United States the Secretary of the Treasury may, before signing a warrant for the amount, submit to the commissioner any facts in his judgment affecting the correctness of such balance; but if, without making such submission, he proceed to act by issuing the warrant and draft and transmits the latter for delivery to the creditor the fact of the indebtedness of the United States in the amount thus ascertained becomes settled beyond the Secretary's recall.
5. So the provision of this section of the Revised Statutes that "balances found by the commissioner of customs shall be subject to revision only by Congress or the proper courts," even if it give discretionary power to the Secretary of the Treasury to refuse to give any effect to the accounting of the commissioner until it has been submitted by him to Congress or the proper courts for revision, yet instead of submitting the account to

such revision he proceeds to issue a warrant and have a draft prepared, his discretion to make such submission is at an end.

6. Where it is unlawful for an official of the United States to make a contract without or beyond an appropriation of money therefor it must be presumed, if the contract be made, that it was in that respect lawful and that there is money in the Treasury appropriated to the payment of the work done under the contract.
7. Where the Secretary of the Treasury has acted upon every matter of discretion which he may exercise in considering whether the United States is indebted to a citizen for work done under a contract and has arrived at the point where the only act to be performed is the delivery of the draft for his compensation the act of delivery is purely ministerial and mandamus will lie to compel such delivery.
8. Where nothing remains to be done in order to close a transaction between the Government and its creditor except the delivery of the draft for the money and the official duty to close it by delivering the draft has accrued it is out of the power of the executive to annex conditions to the delivery of the draft (*e. g.*, that the creditor shall first settle some of his private debts) when such conditions are not for the protection of the Government, but for the benefit of third parties.
9. While the court will not by mandamus command the withdrawal of money from the Treasury to be applied to the satisfaction of a disputed claim against the United States, yet when it appears that the proper officials have adjudicated and adjusted the account and an appropriation out of the Treasury of the United States has been made for the payment thereof and nothing remains to be done but to make the payment, which the official is authorized by law to make, and that the execution of this final and ministerial step is prevented by the official's refusal to act, mandamus will lie to compel his action.

No. 30207. At law. Decided May 5, 1890.
Justices Hagner, Cox, and James sitting.

Hearing on a demurrer to a petition for mandamus against the Secretary of the Treasury to compel him to deliver to the relator a draft assigned to him and retained by the Secretary.

The facts are fully stated in the opinion.
Mr. Franklin H. Mackey, for the relator.
Mr. Chas. H. Armes, for the respondent.

Mr. Justice JAMES delivered the opinion of the court:

The relator presents this petition for the writ of mandamus as assignee of one William Mitchell. He sets forth therein that under a contract with the United States made about the 3d of September, 1886, Mitchell furnished certain material and performed certain labor for the Life-Saving Service, in the construction and repair of seven houses on the coast of Long Island, in the State of New

York; that the account rendered by said Mitchell therefor was adjusted on the 11th of February, 1888, by the Treasury Department and the amount found to be due him of $12,536, as shown by the following letter from the commissioner of customs to said Mitchell:

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
WASHINGTON CITY, D. C., *Feb.* 13, 1888.

Mr. William Mitchell, No. 24 State street, New York city.

SIR: An account has been adjusted in your favor in the amount of $12,536, being due for furnishing the materials and labor and making additions and alterations to seven (7) life-saving station-houses located on the coast of Long Island, N. Y., under contract dated September 3, 1886.

Draft will be remitted.

Respectfully yours,

(Signed) JOHN S. McCALMONT,
Commissioner of Customs.

That a draft dated February 15th, 1888, and numbered 11130, for $12,536, payable to the order of said William Mitchell, was
31 accordingly issued by the Treasury Department, but instead of being delivered to him or the amount thereof paid to him the draft was sent to one Captain Moore, superintendent of construction and repairs of the Life-Saving Service at New York, who was instructed by the Treasury Department not to deliver it or pay its amount to Mitchell until he should pay certain claims and demands presented against him at the Treasury Department by persons alleging his indebtedness to them for material and labor; that the said Moore, acting in pursuance of that instruction, did not deliver the draft to Mitchell, but returned it to the Treasury Department; that it is now therein, in the charge and custody of the said Secretary, and that neither Mitchell nor the relator, his lawful assign, nor any one else acting for and in behalf of either of them, have ever received said amount of $12,536 from the United States, nor any part thereof. The relator further avers, on information and belief, that the claims and demands against Mitchell above referred to are unlawful and unjust, and amount to within $33 of the amount of said draft. The petition then proceeds as follows:

"Your relator further avers that the said amount of $12,536 is justly due and owing by the United States to the said Mitchell or his lawful assign (the relator) for the work done and material furnished as aforesaid; that there is no mistake or error of any sort or kind in his accounts as adjusted as aforesaid by the accounting officers of the Treasury Department, but that the said adjustment of his said account is absolutely correct in every particular, and the amount found to be due thereby is the full sum of $12,536, and that the respondent does not in any way aver or set up as a reason for not delivering said draft to your relator that the said adjustment is not in every way correct, nor that the amount found to be due thereunder

is not now lawfully due and payable to your relator as the lawful assignee of said Mitchell, as hereinafter set forth; and your relator, on information and belief, avers that the said Windom's refusal to deliver said draft to your relator or to cause the same to be delivered to him is based upon no other ground and founded upon no other reason than that the said Mitchell and your relator have refused and still refuse to pay the said claims and demands mentioned in the sixth paragraph of the petition."

The relator further avers that a general appropriation was made by act of Congress to provide for the payment of work to be done in the building and repairing of life-saving stations prior to the performance of the work done under the said contract of September 3, 1886, and that there is sufficient money now in the Treasury of the United States applicable to the payment of the said work so done under said contract.

In explanation of the relator's particular position the petition states that in certain proceedings against Mitchell in the supreme court of the county of New York by judgment creditors the relator was appointed receiver of all the property and rights of action of Mitchell, and that the latter had, in obedience to an order in that cause, executed an assignment to the relator of the draft in question; that afterwards, in order to cure certain formal defects in said assignment, Mitchell had executed to relator another assignment of his claim against the United States and of the said draft, copies of both of which are attached to the petition. It is stated that copies of these assignments had been filed in the Treasury Department before the relator demanded delivery of said drafts.

To this petition respondent demurs, assigning in the note of grounds that one of the matters to be argued upon the demurrer was that this court has not jurisdiction to compel the Secretary of the Treasury to pay out money of the United States on a demand which has not received the sanction of Congress nor been adjudicated in a court having jurisdiction to hear and determine suits against the United States.

Both the language of this note and the argument at the bar suggest a recurrence once more to some expressions of the Supreme Court in the case of Kendall, Postmaster General, *vs.* The United States *ex rel.* Stokes, 12 Peters, 524. Mr. Justice Thompson, speaking for the court, there said:

"Under the first head of inquiry it has been considered by the counsel on the part of the Postmaster General that this is a proceeding against him to enforce the performance of an official duty, and the proceeding has been treated as an infringement upon the executive department of the Government, which has led to a very extended range of argument on the independence and duties of that department, but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceeding in this case interferes in any respect whatever with the rights or duties of the executive, or that it involves any conflict of powers between the executive and judicial departments of the Govern-

ment. The mandamus does not seek to direct or control the
32 Postmaster General in the discharge of any official duty partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act which neither he nor the President had any authority to deny or control."

The principle here stated has been consistently adhered to since the early case of Marbury *vs.* Madison, a period of eighty-seven years. That principle is that the judicial department of the Government cannot, by the writ of mandamus, control the executive department, but may constrain the individual who is charged with a duty therein to proceed with its performance in case he neglects or refuses to act. Although the writ of mandamus is no longer a prerogative writ and is now used as a private remedy, its original function is still kept in mind. It is a proceeding against the individual as a person in default, its object being to require him to perform an official duty imposed upon him by law. If the duty in question involves the exercise of discretion as to how he shall act or decide, he cannot be required by this writ to do anything more than to go on with his discretionary work and to decide. (Harrington *vs.* Hobler, 111 U. S., 796 (797); *Ex parte* Bradstreet, 7 Pet., 647; *Ex parte* Newman, 14 Wall., 165). To that extent the judicial power may interfere by mandamus just as well in cases of executive discretion as in cases of ministeral acts. But if the officer's next duty is to do a particular act which no longer involves the exercise of power to examine and of discretion as to his decision or mode of action, then the judicial power to require him to proceed with his official duties is applicable in the form of an order requiring him to do the particular act remaining to be performed. This, we understand, is what is meant by the rule that the courts may prescribe the very act to be done; as, for example, the delivery of a commission (Marbury *vs.* Madison, 1 Cr., 1–7) or of a land warrant (United States *vs.* Schurz, 102 U. S., 378) when the exercise of discretion has been exhausted, and only that very act remains to be performed as the next official step. In that case the official duty that is to be enforced is not merely a duty to proceed with his work, but a duty to proceed by doing the specific act remaining to be done. But in every case the principle is adhered to that while the officer may, as a person, be constrained to go on with the performance of his official duties, the order of the court can never take a form which amounts to an interference with executive government. It is just because the writ deals with persons and not with government that a particular act may be directed to be done when it is merely ministerial. It is because that act, though in one sense an act of the Government—that is to say, when it is actually done—is an act which it is his individual duty to perform. In such a case no one but himself as an individual is interfered with.

It remains to apply these principles to the determination of the case before us.

The demurrer admits the following to be the facts:

That Mitchell entered into a contract with the United States to

furnish certain materials and perform certain labor for the Life-Saving Service, and duly complied with that contract; that his account was adjusted on the 11th of February, 1886, by the Treasury Department, and the commissioner of customs certified that the sum of $12,536 was due to Mitchell thereon; that a draft for that amount was made and sent to one Moore, an officer and agent of the Life-Saving Service, to be delivered by him to Mitchell if he should pay, but withheld if he should not pay, certain demands against him filed at the Treasury Department; that said draft was returned by Moore to the Treasury Department, and is now there in the custody and control of the respondent; that as a matter of fact the said amount is justly due and owing by the United States to Mitchell or his lawful assign; that there is no mistake or error of any kind in said account as adjusted by the accounting officers of the Treasury Department, but said account is correct in every particular; that respondent does not set up as a reason for not delivering said draft that said adjustment is not in every way correct, nor that the amount found due thereunder is not now lawfully due and payable to relator as the lawful assignee of Mitchell. As to the relator it is in the same way admitted that Mitchell has duly assigned to relator his claim against the United States since the making of said draft, and of course since the issue of the warrant in said case.

The question is whether these facts thus admitted by the respondent's demurrer show that all discretionary duties had been exhausted and whether anything remained to be done by him but to deliver the draft in question or a new draft payable directly to the relator; and, first, we have to consider what antecedent matters remained open as still subject to his discretion and control. For this purpose we must recur to certain statutory provisions.

Section 317 of the Revised Statutes gives to the commis-
33 sioner of customs the same kind of powers as to matters belonging to his bureau which *is* possessed by the First Comptroller of the Treasury. It is in the following words: "The commissioner of customs shall examine all accounts settled by the first auditor relating to the receipts from customs, including accounts of collectors and other officers of the customs, and certify the balances arising thereon to the register, and shall perform all the acts and exercise all the powers relating to the receipts from customs and the accounts of collectors and the other officers of the customs or connected therewith devolved by section 269 upon the First Comptroller in regard to other receipts and other accounts." Then, as to the effect of the commissioner's return in the premises, section 191 provides as follows: "The balances which may from time to time be stated by the auditor and certified to the heads of departments by the commissioner of customs or the comptrollers of the Treasury upon the settlement of public accounts shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the Government and be subject to revision only by Congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a comptroller, may, however, submit to such

comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the comptroller thereon shall be final and conclusive, as hereinbefore provided."

It is not material to inquire whether the Secretary of the Treasury has yet exercised his right to resubmit to the commissioner of customs the balance found due in this case. If he proceeded to act without doing so, that balance remained conclusive upon him. Moreover, the demurrer admits that the balance certified by the commissioner was, in fact, correct, and that no case had arisen, therefore, for the exercise of the Secretary's power and discretion to resubmit the account. We do not find, then, that any discretion remains to be exercised by respondent in reference to the balance found due to Mitchell. The fact of the indebtedness of the United States to Mitchell in the sum of $12,536 had been settled, then, beyond recall when the draft in question was made out and transmitted to Moore.

If, then, the amount in question was due to Mitchell upon his contract, the next question is whether the Secretary had any discretionary power as to paying the debt. In Decatur *vs.* Paulding, 14 Peters, 515, the Supreme Court, in considering the power or duty of the head of a department to revise the decision of his predecessor, pointed out that whether so to revise was itself matter of discretion that if the Secretary had decided to revise he would next have had to exercise discretion as to allowing the claim, and that "after all this was done he must have inquired into the condition of the navy pension fund and of the claims upon it in order to ascertain whether there was money enough to pay all the demands upon it, and, if not money enough, how it was to be apportioned among the parties entitled." But no such question of discretion whether to pay the debt could arise in this case on that ground. It was unlawful to make contracts without or beyond an appropriation, and it must be presumed that this contract was in that respect lawful. Besides, it is admitted by the demurrer that there was an appropriation out of which this debt could be paid.

It was next suggested at the argument that section 191, to which we have referred, points out a ground of discretion to refuse payment, even after the account had been adjusted. That section provides that balances found by the commissioner of customs shall be subject to revision only by Congress or the proper courts; and it was said in argument: "This right of revision necessarily implies authority of superior officers to subject such decisions to the jurisdiction of one or the other of said reviewing authorities; and to do so necessarily involves the power to refuse payment. This would necessarily imply discretion." The answer would seem to be suggested by the argument: The discretionary power to refuse to give any effect to the accounting of the commissioner of customs was exercised and a decision was reached. Instead of taking steps to subject that finding to revision by the proper court by refusing to act upon it the Secretary decided that it did not require revision, because it was correct, and thereupon he proceeded to issue a warrant and have a draft prepared. He himself brought his discretion to an

end, so far as any implied right to cause a revision by the courts was concerned. If he could determine anything by his executive discretion he determined that question and settled the fact that there was nothing that called for revision; and again we repeat that this is admitted by the demurrer.

It would seem, then, that, so far as any questions belonging directly and immediately to the transaction between Mitchell and the United States were concerned, the respondent had acted upon
34 every matter of discretion and had arrived at the point where the only act to be performed was the delivery of the draft for his compensation. This is shown by the very instruction given to Moore to deliver the draft on condition, not that his obligations to the United States should be further or more perfectly performed, but that he should do something exterior to his claim. This order carried in it a declaration that so far as the Government was concerned everything that was to be done had in fact been done, and was in itself conclusive evidence that the remaining act, namely, the act of delivery, was in its nature purely ministerial. In no other condition of the case could the remaining step be committed to the hands of a mere conduit.

But it seems to have been imagined that the respondent had some sort of discretion to annex to such delivery certain conditions relating to third parties. We had occasion, on a former application for a writ of mandamus concerning this matter, to intimate that the condition imposed by the respondent, requiring Mitchell to pay certain claims upon him before he could receive this draft, seemed to be an assumption of something very like the jurisdiction of a court of equity in applying a debtor's assets to the satisfaction of his creditors. The same point now comes before us more directly, and we are of opinion that, whatever executive discretion the respondent may have had in matters between Mitchell and the United States or the Treasury Department, he had none as to matters between Mitchell and his alleged creditors. His executive jurisdiction applied to and was bound by the case between the United States and its contractor. If, as between himself and the Government, Mitchell was entitled to a draft for the amount of his compensation—and by making and sending out the draft at all it was determined that he had that right—then the executive jurisdiction over Mitchell's affairs had reached its end. To all other considerations the executive was a stranger. If the time for the payment of the Government's own debt had come and nothing remained to be done in order to close the transaction between the Government and its creditor except the delivery of a draft for the money, then the official duty to close it by delivering the draft had accrued, and it was out of his power to qualify that duty by annexing conditions, to be complied with by Mitchell, which were not for the protection of the Government, but for the benefit of third parties.

We have not found in the decisions of the Supreme Court anything touching the question here presented, but it was considered by the King's Bench in The King *vs.* The Lords' Commissioners of the Treasury, 4th Adol. & Ellis, 286, 31 Eng. Com. L. Rep., 139. In

that case the lords of the treasury had submitted a vote to Parliament for granting a retired allowance to a public officer, on certificate of ill-health, according to the Stat. 3 Geo., 4 c., 113. The vote passed, but the pension was not specifically mentioned in the appropriation act, which, however, directed a gross sum to be applied in discharge of retired allowances. The lords of the treasury, on application by the party for payment, informed him that he might receive it from a treasury officer whom they named. The officer declined paying, inasmuch as he had no authority from the lords of the treasury, and they, being again applied to, refused to give such authority, except on condition that the party would forego certain legal proceedings, which he refused to do. It was held that the party had a legal right to the allowance, the lords of the treasury having admitted that the money for paying the allowance was in their hands. Lord Denman, C. J., said that the money was in the hands of respondents for payment to the party and they had no right to annex conditions to the payment. This ruling was approved by the King's Bench in the subsequent case of The King *vs.* The Lords' Commissioners *in re* Hand, 4 Ad. & Ellis, 984.

As to an implied or inherent executive discretion to annex to the performance of a ministerial act the particular kind of condition which was imposed in this case, one more consideration may be added. The respondent had no means of investigating and determining the validity or justice of the claims filed against Mitchell. For aught that he could possibly know they might be wholly or in part fraudulent, or they might be open to counter-claims or set-offs between the parties. In contemplation of law he knows absolutely nothing about the claims whose payment he insists upon, and it is impossible to suppose that he has a discretion to decide in the dark. We have suggested that this condition seems to be an assumption of jurisdiction in equity, but even a court of equity would decline to enforce claims of creditors without a previous establishment of their validity by judicial inquiry and judgment.

In connection with this part of the case it is proper to state that we do not decide that there are no circumstances in which the
35 Secretary of the Treasury can have a discretion to refuse payment, even when the proceedings have reached the stage shown in this case. If such grounds of discretion exist they may yet be shown in the return. On this point we may refer to an observation of Lord Denman in Rex *vs.* The Lords' Commissioners, *supra*: "If, as has been suggested," said his lordship, "it should on any occasion be unsafe, with reference to the public service, to make a payment of this kind, the fact may be stated on return to the mandamus." 4 Adol. & Ellis, 295.

Finally it was urged at the argument that the delivery of this draft or of one payable directly to the relator as assignee cannot be enforced by the writ of mandamus, because such a proceeding is substantially a suit against the United States, having for its object the withdrawal of money from the Treasury of the United States. On this point the cases of Reeside *vs.* Walker, 11 How., 272, and United States *vs.* Guthrie, 17 How., 284 (303–'4), were cited. The respond-

ent's citation is from the opinion delivered by Mr. Justice Daniel in the latter case, speaking for himself and three other justices. Mr. Justice Curtis, speaking for himself and three other justices, placed their concurrence upon wholly different grounds, while Mr. Justice McLean dissented; so that the passage cited was from a minority opinion. We cannot doubt, however, that the court would have concurred in the opinion expressed by Mr. Justice Daniel, that no court could command the withdrawal of a sum of money from the Treasury, in the absence of an appropriation by Congress, to be applied to the satisfaction of a disputed or controverted claim against the United States. We suppose this proposition to be unquestionable, but do not perceive that the case before us falls within it, nor do we perceive that this proceeding contains the essential elements of a suit against the United States. The office of such a suit would be to ascertain and establish a right against the United States, which the United States had not before conceded. In this case it appears that the United States have authorized competent authority to adjudicate and establish the right to compensation; that it has been in fact so adjudicated and established; that an appropriation out of the Treasury of moneys for the payment of such claims has been made; that respondent has been authorized to apply such specific share of these moneys as he should find necessary for each of such claims as he should adjudicate it; that this is equivalent in law to a specific appropriation of that sum for that purpose; that nothing remains but to make payment, which respondent is authorized by law to make in settlement of the adjudicated claim, and that the execution of this final and ministerial step is prevented by the officer's refusal to act. In such a case the object of the proceeding is not to constrain the United States to admit and satisfy a right, but to enforce against an individual a command of the United States to satisfy a claim which the United States has through his own action already recognized and established. We repeat that we perceive in such a proceeding no adversary relation between the relator and the United States, such as is involved in a suit against the United States. The result in no way alters or affects the position already held by the United States; it affects only the person who stands in the way and prevents the will of the United States.

Upon the case, as it stands on the demurrer, our conclusion is that when the draft in question was made out the executive discretion of respondent had been already exercised and exhausted; that the duty of delivery had accrued, and that that duty was purely ministerial, and not subject to conditions which did not enure to the protection and benefit of the United States.

The demurrer is accordingly overruled and respondent is ruled to make return.

36 *Motion for Leave to Amend Petition. Filed May* 19, 1890.

In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } Law, No. 30207.

Now comes the relator and, by his attorney, Franklin H. Mackey, Esq., moves the court for leave to amend the petition herein (which by stipulation of counsel stands as the alternative writ) by inserting therein the matters and things as set forth in the proposed amendment hereto annexed; and as grounds for said motion he refers to the affidavit of his said attorney, hereto annexed.

FRANKLIN H. MACKEY,
Att'y for Relator.

Charles Armes, Esq., att'y for respondent:

Take notice that on Wednesday morning, Feb'y 21st inst., at the opening of the general term or as soon thereafter as the court's attention can be had, I shall call up the above motion.

FRANKLIN H. MACKEY,
Att'y for Relator.

37 Service acknowledged May 19, 1890. It is agreed that the papers referred to in said motion may be filed at any time before the calling up of the motion.

C. H. ARMES.

Affidavit of Franklin H. Mackey in Support of Motion. Filed May 19, 1890.

In the Supreme Court of the District of Columbia, the — Day of May, 1890.

U. S. *ex Rel.* REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } Law, No. —.

Franklin H. Mackey, being duly sworn, says that since the overruling of the demurrer in this cause he has learned from the attorney for the respondent that among the allegations of fact which the respondent proposes to set up as a defence in the return to the alternative writ is in substance the following, to wit:

38 That in the contract of the 31 of September, 1886, referred to in the 3d paragraph of the petition, there was provided a penalty of $50.00 per day for every day that the work was not completed by the time mentioned in said contract; that said Mitchell did not complete said work in said time, and thus he thereby incurred a large penalty amounting to several thousands of dollars by reason of said delay; that the said Mitchell thereupon promised and

agreed with Mr. Maynard, then Assistant Secretary of the Treasury, that if the Treasury Department would not enforce said penalty, but would allow him the amount due him irrespective of said penalty, he, Mitchell, would settle the demands of certain persons who had filed claims against him with the Treasury Department, and that in consideration of said promise of Mitchell the enforcement of said penalty was waived and he was allowed the full sum of $12,536.

Affiant says that when he prepared and filed the relator's petition in this cause he had not the slightest intimation from the re-
39 spondent or any one else that any such defence was to be set up, for the reason that when the solicitor of the Treasury, Mr. Hepburn, intimated that such an agreement had been made by Mitchell your affiant showed the said Hepburn that it was impossible (from the date of the letter of the comptroller to Mitchell announcing the adjustment of his account) that such an agreement or promise by Mitchell could have been made, for if Mitchell made any such promise it must have been before the letter of the commissioner of customs was written, which letter is dated February 13th, 1888, and set forth in the petition, whereas by a letter dated the 15th of February, 1888 (two days later), addressed by Mr. S. I. Kimball, general superintendent of the Life-Saving Service, to the superintendent of construction in said service at New York (Capt. Moore), and enclosing the draft for $12,536, payable to the order of Mitchell, referred to by the commissioner of customs in his letter of February 13th, 1886, he, Kimball, says:

"In a conference with the Assistant Secretary of the Treas-
40 ury yesterday (Feb'y 14th) William Mitchell, who was present, agreed that the draft should be sent to you with the understanding that he would communicate with these people (the claimants) and fix a day when he would meet them in his office and adjust their claims. When this meeting occurs you are authorized to deliver the draft to him."

This "conference with the Assistant Secretary of the Treasury" was the only time that Mitchell was ever at the Department, as was admitted by Mr. Kimball to affiant, nor had Mitchell any other conference or communication, verbal or written, with the said Secretary in respect of said claimants. Affiant also showed to the said Hepburn an affidavit of said Mitchell as to said alleged penalties, and affiant believes he filed a copy of same in the Treasury Department. A true copy of said affidavit is annexed to the amendment proposed to be filed in this cause. It appears, therefore, that said alleged conversation or conference was had, if at all, after the
41 account of Mitchell was adjusted and after he had been notified of its adjustment and that the draft would be remitted to him and after the draft had been drawn. Consequently it was impossible by the chronology of the events that the said Mitchell at said conference, which was the only one admitted by the Department to have been had, could have promised that if his account was adjusted without reference to said penalties he would settle with said alleged creditors, for, as is seen, the account had already been

adjusted and a letter to that effect addressed to Mitchell the day before.

Affiant therefore says that, having called the attention of said Hepburn to said inconsistency of dates, he supposed that said Hepburn acquiesced therein, inasmuch as the matter was never afterwards alluded to, and not desiring to file the petition with irrelevant matter he made no statement of the circumstances herein narrated.

Affiant is, therefore, surprised that such a defence should be again advanced, and inasmuch as it is possible to so set it up in the
42 return in such a manner as to give it *prima facie* the resemblance of truth unless days and dates are given and all the circumstances connected therewith set forth, in order that it may carry with it its own contradiction, affiant believes it important to the rights of his client and to the demonstration of the truth that an amendment of the petition should be made setting up the said matter, with particularity of dates and circumstances, so that all and not part of the facts shall be before the court.

FRANKLIN H. MACKEY.

Signed and sworn to before me this 19th day of May, 1890.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk*.

Order Allowing Respondent 10 *Days' Time to Make Return of Amended Petition.*

In the Supreme Court of the District of Columbia. In General Term.

U. S. *ex Rel.* REDFIELD
vs.
WM. WINDOM, Sec'y of the Treasury. } Law, No. 30207.

43 The motion of the relator for leave to amend the petition having been submitted and considered by the court, it is, this 9th day of June, A. D. 1890, ordered that the said amendment be, and the same is hereby, allowed to be made, and the respondent is hereby allowed ten (10) days to make return.

For the court:

CHARLES P. JAMES, *J.*

44 *Amendment of Partition with Affidavit, &c. Filed June* 9, 1890.

In the Supreme Court of the District of Columbia.

U. S. *ex Rel.* REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } Law, No. 30207.

The relator hereby, by leave of court first had and obtained, amends the petition herein by adding at the end of the ninth paragraph thereof the following, to wit:

"And your relator is informed and believes and therefore avers that the said Windom claims that he is justified in withholding said draft until said Mitchell or your relator settles or pays the said claims and demands, because in the said contract of September 3, 1886, and referred to in the third paragraph of the petition there was provided a penalty of $50 per day for every day that the work provided for in said contract was not completed by the time mentioned in said contract, and that he, Windom, is informed and believes that said Mitchell did not complete said work within said time and not until many days thereafter, whereby there accrued against said Mitchell a large penalty, amounting to several thousands of dollars; that thereupon said Mitchell promised the then Assistant Secretary of the Treasury, Maynard, that if said penalty was not enforced against him and the amount allowed which was otherwise due for the work done under said contract he, Mitchell, would settle the demands of the persons who had filed said claims against him in the Treasury Department, whereupon the said Maynard in consideration of said promise of Mitchell waived the enforcement of said penalty and allowed the full sum of $12,536 for said work, and that because of said promise of Mitchell the respondent Windom refuses to deliver said draft until said claims are paid.

45 And the said Windom informs your relator that his information in regard to the alleged waiver is derived only from the statements contained in a letter addressed, November 27th, 1889, by said Maynard (after the expiration of said Maynard's term of office) to S. I. Kimball, Esq., sup't of the Life-Saving Service, inquiring of said Maynard as to the facts of said alleged waiver, which said letter of said Maynard is herewith filed, marked Exhibit I. H. M. No. 1, and is prayed to be taken as part hereof.

And your relator is informed by said Windom that when in said Windom's judgment the proper time has arrived so to do he proposes to reopen the said account of said Mitchell and to readjust the same by enforcing said penalty and deducting the amount alleged to be forfeited from the amount heretofore found to be due; and your relator hereby denies the right of the said Windom to direct at this time or at any time after the issuing of said draft for $12,536 the readjustment of said account, even if the matters and things above alleged as to said alleged waiver of penalties are true.

And your relator denies that there was any adjustment in said Mitchell's account of the amount to be paid him conditioned upon the satisfaction by said Mitchell out of the sum allowed by the Treasury Department of the claims referred to in the said letter or of any claims whatever by third parties against said Mitchell.

46 And your relator says that he is informed and believes, and therefore avers, that no such proposition or promise or any other proposition or promise looking to the payment of said claimants or the settlement of their demands was ever made to said Maynard or any one else by said Mitchell or by any one for him either upon consideration of said penalties being waived or upon any other consideration, and your relator in this connection refers to the affidavit herewith filed and made part hereof, marked Exhibit

W. H. M. No. 1, the statements of which affidavit your relator is informed and believes, and therefore avers, are true; and your relator further says that he is informed and believes, and therefore avers, that the only time that said Mitchell was ever at the Treasury Department or had any communication, verbal or written, with said Maynard, either by himself or any other person authorized to speak and act for him, or with any other official of the Treasury Department in reference to the demand of said claimants was on the 14th day of February, 1888, which was the occasion and time mentioned in the letter of said Maynard above set forth and also in the letter of S. I. Kimball, general superintendent of the Life-Saving Service, and adddressed to Capt. G. W. Moore, the superintendent of construction, at the city of New York, which letter is dated the 15th of February, 1888, and inclosed the said drafts for $12,536, payable to the order of said Mitchell. A true copy of said letter will be found in Exhibit G. W. M. No. 1, hereinafter referred to and filed herewith, and is made part hereof.

The exact date on which said account was adjusted was February 11, 1888, as shown by Maynard's own letter, Exhibit I. H. M. No. 2, filed herewith.

And your relator is informed and believes, and therefore avers, that the warrant or draft had already been drawn and was in the hands of said Kimball at said "conference" of the 14th of February referred to by said Kimball in his said letter of February 15 and by said Maynard in his letter of November 27, 1889, and that said Kimball has admitted to relator's attorney that he, Kimball, did have said draft in his possession at said conference, as stated by said Mitchell in his said affidavit.

47 And your relator further avers that as a matter of fact no penalties for delay in the completion of the work under said contract of September 3, 1886, were received by said Mitchell, nor were any other penalties of any sort or kind incurred by him for any default or unauthorized departure from the terms of said contract, as will appear by the sworn testimony, especially upon page 8 thereof, of said Moore, superintendent as aforesaid, taken before the supreme court of New York and herewith filed, marked Exhibit G. W. M. No. 1, which is prayed to be read as part hereof.

And your relator also files herewith, and prays that they may be read as part hereof, true copies of three letters, marked respectively C. S. F. No. 1, I. H. M. No. 1, and I. H. M. No. 3, which were addressed to and received by your relator, the second and third of said letters being signed by the Hon. I. H. Maynard, then Assistant Secretary of the Treasury, and the second by the Hon. C. S. Fairchild, then Secretary of the Treasury, by which said letters it will appear that no such reason as above set forth for retaining the draft in question was ever presented your relator by the Treasury Department when your relator made demand for said draft.

AMASA A. REDFIELD,
By his attorney, FRANKLIN H. MACKEY.

Franklin H. Mackey, being duly sworn, says that he is the attorney for the relator in this proceeding, and that he has read the foregoing amendment of the petition and knows the contents thereof, and the facts therein stated upon the relator's knowledge are true, and those stated upon information and belief he believes to be true.

FRANKLIN H. MACKEY.

EXHIBIT I. H. M. No. 1.

STANFORD, DELAWARE CO., N. Y., *Nov.* 27, 1889

S. J. Kimball, Esq., superintendent Life-Saving Service.

DEAR SIR: I was away when your letter of the 21st came, and could not send reply in time for the hearing on the 25th, as requested. I have a very distinct recollection that the entire adjustment of the amount to be paid on the Mitchell contract was conditional upon the satisfaction out of the sum allowed by the Government of the claims of the mechanics and other laborers and material men for work done and material furnished to Mitchell in the erection
48 of the station building, and it was a very essential part of the arrangement that the Government was not to part with the control of the money to be paid until the holders of these claims had been in some way satisfied. In order that this might be done without embarrassment to Mr. Mitchell it was agreed that the draft for the amount agreed upon should be sent to the representative of the service at New York, who had an office in the same building with Mitchell, and the creditors were to meet him and Mitchell there at some appointed time, and they were to be first paid or satisfied out of the proceeds of the draft, and if this was not done the draft was not to be delivered. This arrangement was entirely satisfactory to Mr. Beardsley and Mr. McCammon, who were attorneys for Mitchell and were both present, and was acquiesced in by him.

It was certainly a very material question in deciding to remit the penalties incurred by the contractor that these claims were to be paid out of the funds which would be thus provided, and I would not have otherwise approved or recommended their remission. There would have been no equity in remitting them if the men by whose labor and money the station had been built were to go unpaid.

It was understood at the time that the contractor was virtually insolvent, and that there was no other way in which these claims could be paid except from funds provided by the Government.

The foregoing statements, I think, are fully responsive to the inquiries contained in your letter.

Very truly yours,

(Signed) I. H. MAYNARD.

49–59 EXHIBIT W. H. M. No. 1.

THE UNITED STATES *ex Rel.* AMASA A. REDFIELD
against
WILLIAM WINDOM, Secretary of the Treasury.

CITY AND COUNTY OF NEW YORK, *ss:*

William Mitchell, being duly sworn, deposes and says that I entered into a contract with the United States Treasury Department to repair twenty-three life-saving stations—fourteen on Long Island and nine on the coast of Massachusetts—in the month of September, 1886, and owing to the lateness of the season it was impossible for me to get material to the beach on account of the fact that the Great South Bay had frozen over as early as November, 1886. Deponent had called these facts to the attention of Captain Merriman, superintendent of repairs, life-saving stations, and he said to go ahead and do the best I could; that as soon as the season opened in the spring to go on with the prosecution of the work. At the opening of spring work was resumed and continued until the whole work was completed, and deponent avers that no similar job of twenty-three houses was ever repaired and completed in the same given time in which these houses were, and that it is a common practice for the various departments to extend the period of a contract for one year or more.

That when said houses were completed, on or before January, 1888, Captain Moore, superintendant of life-saving stations, notified me to appear before him and sign all the necessary vouchers, which request I complied with, and which vouchers were drawn for the full amount of my contract with the United States Treasury; that after said vouchers were sent to Washington, and not hearing from them, I decided to go on to Washington, and did so between
60 the 10th and 14th of February, 1888. At that time I had an interview with Judge Maynard. At that interview Judge Maynard said that I must call my creditors together and pay them off before they would deliver to me the warrant of $12,536. At the same time Mr. Kimball showed me the warrant, and then they said that this warrant would be sent on to Captain Moore and I must call my creditors together in New York. At that that time I objected to this proceeding, and said that the United States Government had no right to meddle with my private affairs, and Judge Maynard said that was so, and said they took this course to save them annoyance in Washington. Deponent at that time stated that every one of those liens filed were wrong, and it would not be right to pay the same, and deponent says that he never promised, directly or indirectly, with Judge Maynard or any one else, to settle the memorandum claims filed with the Treasury Department, at that interview or any other time, but, on the contrary, objected to paying the same; and that this conversation occurred long subsequent to the completion of the work, and when it did occur, at that same interview, said Kimball showed deponent the said warrant all

signed ready for delivery. Deponent further says that at said interview nothing was said about any penalty being exacted on said contracts, and that nothing was said about the forfeiture being waived on condition of said deponent settling with said claimants, as is apparent and self-evident from the fact that before said interview the warrants had been drawn for the full amount, waiving said penalties.

WILLIAM MITCHELL.

Sworn to before me this 27th day of November, 1889.
[SEAL.] S. M. HAYWARD,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

61 EXHIBIT G. W. M. No. 1.

New York Supreme Court.

PATTERSON BROTHERS
against
WILLIAM MITCHELL.

NEW YORK, *March 5th*, 1888.

Cornelius Doremus, for plaintiffs; Barlow & Carman, for William Mitchell, judgment debtor; Stephen A. Walker, U. S. attorney, for George W. Moore, the person served with the order.

GEORGE W. MOORE, being duly sworn, says:

By Mr. BARLOW:

Q. Where is your place of business, Captain?
A. New York.
Q. At 24 State street?
A. Yes; at 24 State street?
Q. And are you in the employ of the United States Government?
A. Yes, sir.
Q. In what capacity?
A. Captain of the United States Revenue Marine Service—regular duties—and special duty is superintendent of construction of life-saving stations.
Q. Are you acquainted with William Mitchell, judgment debtor?
A. I am, sir.
Q. Have you in your possession a warrant of the United States Government drawn to the order of William Mitchell?
A. I have jointly with Captain Merriam.
Q. Is it in your possession?
A. Jointly in the possession of both of us.
Q. Have you the draft here to-day?
A. I have it with me to-day.
Q. Will you be kind enough to produce it—exhibit it?
A. It is in that envelope (exhibiting envelope).

Q. Will you let me inspect it?
A. If the district attorney says.

62 Mr. ROSE (assistant United States attorney:) We will let you have it if the court orders us to do it.

(The witness, under advice of counsel, declines to have the draft marked in evidence, but offers to hand the same to the court with the evidence in this case, and the sealed envelope containing the draft in question is marked Exhibit I, of this date, A. J. B.)

Q. What is the endorsement on the outside of that envelope?
A. "Superintendent of construction life-saving stations, No. 24 State street, New York city."
Q. That is all, is it?
A. That is all, except here——
Q. I mean this here (indicating.)
A. Superintendent of construction life-saving stations, 24 State street, New York.
Q. There are no written instructions on the outside of the envelope?
A. No, sir.
Q. Is your name on the outside of the envelope?
A. No, sir.
Q. When that says superintendent construction of life-saving stations that means you?
A. It says superintendents.
Q. Well, that means you and Captain Merriam?
A. Me and Captain Merriam.
Q. Captain Merriam is ill now, is he not?
A. Yes, sir.
Q. And you have entire charge of the office?
A. He is not so ill but what I can see him every day and consult him about the business.
Q. You and he jointly have charge?
A. Yes, sir.
Q. Have you seen the draft?
A. I have, sir.
Q. When did you see its contents last?
A. This morning.
Q. And it was this morning that you sealed that envelope?
A. Yes; this morning I sealed this.
Q. By whose instructions did you seal it?
A. By nobody's.
Q. By nobody's; of your own volition?
A. Yes, sir.
Q. What is the date of this draft or warrant?
A. I could not say whether it is the 11th, 12th, or 13th of February.

63 Q. Is it on or about the 13th of February, 1888?
A. On or about the 13th of February, 1888.

Q. To whose order is that draft or order drawn?

A. Payable to the order of William Mitchell.
Q. What is the amount of that draft?
A. $12,536.00.
Q. What is the number of that draft?
A. 11130, the 15th of February.
Q. And by whom is it signed?
A. I am not sure; I think the Treasurer.
Q. At the time you received that warrant from Washington did you receive any letters or instructions with it?
A. I did.
Q. Have you those instructions in your possession?
A. Yes, sir; I have.
Q. Have you any objections to my seeing them?

(Letter is handed to counsel. The said letter is offered in evidence and marked "Exhibit 2," of this date, of which the following is a copy:)

TREASURY DEPARTMENT,
OFFICE OF GENERAL SUPERINTENDENT,
U. S. LIFE-SAVING SERVICE,
WASHINGTON, D. C., *Feb'y* 15, 1888.

Superintendents of construction life-saving stations, Atlantic and Lake coasts, 24 State street, New York city.

GENTLEMEN: Inclosed herewith please find draft No. 11130, dated this day, and payable by the Treasurer of the United States and drawn by that office to the order of William Mitchell for the sum of $12,536, being the balance due him under his contract, dated September 3, 1889, for furnishing material and labor and making additions and alterations to seven life-saving stations in the third district, known as the Oakland, Gelgo, Jones' Beach, Zach's
64 Inlet, Point Lookout, Rockaway, and Rockaway Point stations. In this communication you are informed the following-named persons have filed claims in this office for work and material furnished Mr. Mitchell and used in the improvements to the stations above named: Benjamin Carpenter, George A. Hooper, Amityville, N. Y., att'y, for furnishing tanks for certain stations, $125; William Anderson, George Wallace, Freeport, N. Y., att'y, for furnishing materials for painting certain stations and for money expended for express charges thereon, $228; William Waring, George Wallace, att'y, Freeport, N. Y., for services as a mason upon certain stations, $262; Vooris & Pettit, George Wallace, Freeport, N. Y., att'y, for carpenter work upon certain stations, $1,450.75; R. S. Whipple, F. R. Bellamy, Brooklyn, N. Y., att'y, for materials furnished, $1,484.35; Charles Wood, Bergen & Dykman, Brooklyn, N. Y., att'ys, for material furnished, $8,848.77; James S. Baker, keeper Lone Hill life-saving station, Sayville, N. Y., for materials furnished, $110.42; a total of $12,503.29. In a conference with the Assistant Secretary of the Treasury yesterday, William Mitchell, who was present, agreed that the draft should be sent to you with the understanding that he would communicate with these people and fix a day

when he would meet them in his office and adjust their claims. When this meeting occurs you are authorized to deliver the draft to him.

Respectfully yours, S. I. KIMBALL,
General Suprintendent.

Q. Have you any other instructions from the United States Treasury other than this letter concerning this draft or warrant?
A. Yes; I got a dispatch.

(The district attorney stated that it had no material bearing to the case.)

65 Q. You have received no other instructions?
A. No, not in regard to the draft.
Q. Either verbal or written?
A. No, sir.
Q. And this letter is the only reason why you don't turn this draft over to Mr. Mitchell, is it?
A. That is all, and because that meeting has not been held.
Q. The only reason that you don't turn the draft over to Mr. Mitchell is the fact of the contents of this letter and the orders that have been served on you by the court?
A. I suppose the order of the court has a separate bearing on the same, but the orders in that letter are sufficient for me.
Q. I want all of them—the reasons are—the original letter from the Treasury and orders enjoining you from doing it?
A. Yes, sir.
Q. Do you know anything personally about the work performed by William Mitchell?
A. On account of which this draft is drawn?
Q. Yes.
A. I know personally through my assistants; I have not myself been on the spot.
Q. The work has all been performed by Mitchell, has it not?
A. Yes.
Q. And what is the process or routine that is gone through with in your office in a case when work has been performed?

Mr. ROSE: What difference does it make? Ask him about this particular case if you want to.

Q. What was the routine in this particular case?
A. When my assistants or our assistants certified that the work had all been done according to the specifications we made out the bills, and after they were approved they were forwarded to Washington.
Q. As I understand the situation in this case, William Mitchell performed all the work according to his contracts, and your assistants certified to you that the work had been performed, and upon that certification to you, then you certified to the head of the
66 Department in Washington that Mr. Mitchell had complied with his contract and was entitled to his money, and after

that this draft was drawn to the order of William Mitchell. Is that the fact?

A. We didn't certify that he was entitled to his money. We certified that the work had been done according to the contract and specifications, except in some authorized departures, which may have been made by the order of the Secretary.

Q. As far as your Department was concerned, you certified to the completion of the work by Mitchell?

A. Yes, sir.

Q. And after this draft came to you, as you have stated?

A. Yes, sir.

Q. And this affidavit which was read in the court or the contents stated to the court this morning by the district attorney, that you hold this—I will read the exact language: "Deponent says he has no property in his possession whatever belonging to the defendant above named, but that, as an officer of the United States Government, under instructions from S. I. Kimball, general superintendent of the United States Life-Saving Service, the board of superintendents of construction received under cover of a letter dated February 15, 1888, a draft payable by the Treasurer of the United States and drawn by that office to the order of Mr. William Mitchell for the sum of $12,536. The instructions of the said general superintendent to the board above named was to deliver said draft to said William Mitchell upon certain conditions, which are set forth in said letter of instructions; that said draft has not yet been delivered, and is now the property of the United States Government, and is in the custody and possession of the said board of supervisors and agents of said Government." Now, when you refer in this affidavit to the conditions you don't mean to state that it means conditions which imply that said Mitchell has not performed his part towards the United States?

A. I mean the conditions set forth in that letter.

Q. These are the only conditions you mean?

A. These are the only conditions.

67 Q. And so far as the relations between Mitchell and the United States Government are concerned, and as far as you know, as one of the Government superintendents of this Department, William Mitchell is entitled to payment of this money?

A. I don't give any opinion as to that.

Q. As far as you personally know, as between Mitchell and the United States Government, as far as his contract, I mean, outside of the letter, Mitchell is entitled to the payment of this money?

No response.

Mr. ROSE: I don't see that that is material.

Q. Well, as far as you personally know, are there any other conditions than the ones stated?

A. No.

By Mr. ROSE:

Q. Who is your superior in office?

A. S. I. Kimball.

Q. And he is connected with the Treasury Department?

A. Yes, sir; he is connected with the Treasury Department.

Q. General superintendent?

A. General superintendent of the Bureau of Life-Saving Service.

Q. You and Mr. Merriam together had charge of this work which was done by Mr. Mitchell?

A. Yes, sir.

Q. Both of you as officers of the United States Government?

A. Yes, sir.

Q. This letter, when it was directed to the superintendents of construction life-saving stations, Atlantic and lake coasts, who are they?

A. Captain Merriam and myself.

Q. Have you had any notice or do you know whether that meeting with certain people and Mr. Mitchell to adjust these accounts has been had since the 15th of February?

A. Not to my knowledge, sir.

Q. No such meeting has ever taken place that you know of?

A. No.

Q. When these papers were served on you did you have this draft in your actual possession?

A. Actually myself?

Q. Yes.

A. No, sir.

68 By Mr. BARLOW:

Q. If you didn't have this draft in your actual possession you had it under your control where you could get at it?

A. Where Captain Merriam and myself could get it.

Q. And since the order was served on you you have obtained the draft?

A. Since?

Q. Yes.

A. Yes, sir.

Q. And you have already testified that you now have the draft in your possession, in this envelope?

A. Yes, sir; I have it.

GEO. W. MOORE.

Sworn to before me this 6th of March, 1888.

MR. J. O'BRIEN, *J.*

EXHIBIT C. S. F. No. 1.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April* 17, 1888.

Mr. Amasa A. Redfield, Equitable building, 120 Broadway, New York city.

SIR: Your two letters, dated respectively the 5th and 13th instant,

the former enclosing an order appointing you receiver of the estate of William Mitchell and a copy of his assignment to you, and the latter asking when you may expect to receive the Treasury warrants (drafts) for the work done under his contract with this Department, are received.

Before taking action in the matter I desire to be informed for what creditors of Mr. Mitchell you are trustee.

Some time before you were appointed receiver Mr. Mitchell agreed with the Department that certain creditors who had furnished labor and material and who had notified the Department of their
69 claims should be paid from the amount due him. It would seem that these parties ought equitably to be paid out of the funds appropriated for the work upon which their labor and material have been expended, and it is the settled policy of the Department in such cases not to permit the money to be diverted to other purposes

Respectfully yours, C. S. FAIRCHILD, *Secretary.*
S. I. K.

EXHIBIT I. H. M. No. 2.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April* 24, 1888.

Mr. Amasa A. Redfield, Equitable building, 120 Broadway, New York.

SIR: In response to your request of the 18th instant, I send you the names of the creditors of Mr. Mitchell, referred to in the letter of this Department, dated April 17, 1888. The amount of the claims and the post-office addresses of the claimants are also given, together with the names of the attorneys, so far as known.

Benjamin Carpenter; address, not known; $125; attorney, Geo. A. Hooper, Amityville, N. Y.

William Anderson; address, Merrick, Long Island; $222; attorney, George Wallace, Freeport, L. I.

William Warring; address, Bellmore, Long Island; $262; attorney, George Wallace, Freeport, L. I.

Vooris & Pettit; address, not known; $1,450.75; attorney, George Wallace, Freeport, L. I.

R. F. Whipple; address, Brooklyn, N. Y.; $1,484.35; attorney, F. P. Bellamy, 204 Montague street, Brooklyn, N. Y.

Charles Wood; address, Amityville, N. Y.; $8,848.77; attorney, Bergen & Dykman, 189 Montague street, Brooklyn, N. Y.

James S. Baker; address, Sayville, N. Y.; $110.42.

70 In this connection you are informed that in addition to the above there have been received at this Department since February 11, 1888, the date Mr. Mitchell's bill was passed upon by this office, the following claims, some for labor and material and others for board furnished his workmen:

Patterson Bros.; address, New York city; $2,375.03; attorney, Cornelius Doremus, 206 Broadway, New York city.

William H. Miller; address, Bay Shore, N. Y.; $67.76.

Robert Albin; address, Bay Shore, N. Y.; $3.

William H. Miller; address, Bay Shore, N. Y.; $5.52.

Daniel B. Abrams; address, Oceanus, N. Y.; $20.

Andrew Rhodes; ——, Freeport, N. Y.; $4.15.

Andrew Rhodes; address, Freeport, N. Y.; $4.80.

Andrew Rhodes; address, Freeport, N. Y.; $12.40.

Henry Kremer; address, Bellport, N, Y.; $24.84.

Barney King; address, Bellport, N. Y.; $10.

Philip K. Chichester; address, Amityville, N. Y.; $4.20.

Keeper and crew; address, Blue Point life-saving station, Patchogue, N. Y.; $143.72.

John Albin; address, Patchogue, N. Y.; $3.

Charles E. Wicks; address, Bay Shore, N. Y.; $65.93.

Sidney Smith; address, Centre Moriches, N. Y.; $17.25.

Sidney Smith; address, Centre Moriches, N. Y.; $18.28.

Joshua Ryder; address, Centre Moriches, N. Y.; $3.25.

Elbert Chichester; address, Centre Moriches, N. Y.; $116.82; attorney, Nicoll Floyd.

Charles H. Barber; address, Centre Moriches, N. Y.; $93.72; attorney, Nicoll Floyd, Centre Moriches, N. Y.

In addition to the foregoing the Department has received notice that by reason of the failure of Mr. Mitchell to perform the stipulations of his contract the crew of the Smith's Point life-saving station, with a portion of the apparatus, was compelled to occupy a part of the house of Mr. John D. Seaman, of Brook Haven,
71 New York, and that on this account Mr. Seaman claims from the Government the sum of $60.

Respectfully yours.

I. H. MAYNARD,
Assistant Secretary.

S. I. K.

EXHIBIT I. H. M. No. 3.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *May* 28, 1888.

Amasa A. Redfield, Esq., Equitable building, 120 Broadway, New York city.

SIR: In reply to your letter of the 19th instant, referring to the balance remaining unpaid on the contracts of William Mitchell for work upon certain life-saving stations, in which you state that you are informed by Mitchell that he has not consented to the payment by the Department of this balance to any other persons, I have to state that Mr. Mitchell did consent to its retention by the Department until he should furnish satisfactory evidence of the adjustment of the claims of certain parties who had supplied material and labor for him upon the stations and who had notified the Department of

the existence of such claims. The names of these persons have heretofore been furnished you. In furtherance of this arrangement and with a view of preventing embarrassment to Mr. Mitchell, it was agreed that the draft for the balance due on account of the contract for the Long Island stations should be sent to Captain George W. Moore, an officer of this Department stationed in New York and having an office in the same building with Mr. Mitchell, and
72 that Mr. Mitchell should, upon a day set, have the creditors who appealed to this Department or their representatives present, when Captain Moore was to deliver the draft and payment be made to the creditors in his presence. The draft was sent to Captain Moore accordingly, but Mr. Mitchell failing to perform his part of the agreement it was returned to the Secretary of the Treasury, who will hold it until the aforesaid claims are adjusted. The general superintendent of the Life-Saving Service, Mr. McCammon, of this city, and Mr. Beardsly, of New York, were all present and witnesses of the foregoing understanding, and all of them have recently given assurance that the arrangement made was as narrated above.

Respectfully yours,

I. H. MAYNARD,
Assistant Secretary.
S. I. K.

Return of Respondent. Filed June 26, 1890.

In the Supreme Court of the District of Columbia. In General Term.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD *vs.* WILLIAM WINDOM, Secretary of the Treasury. } At Law. No. 30207.

The return of the respondent, William Windom, Secretary of the Treasury, to the alternative writ of mandamus issued upon the petition of the above-named relator, respectfully shows as follows:

1. The respondent has no knowledge concerning the facts alleged in paragraph numbered 1 of said petition.

2. He admits that he is Secretary of the Treasury, as alleged in paragraph numbered 2, but denies that he has custody of the draft described in said petition.

3. He admits that the averments in paragraph 3 are true.

73 4. He admits that an account was stated by the accounting officers of the Treasury Department on the 11th day of February, 1888, under a former Secretary of the Treasury, and that notice thereof was given the claimant; but the respondent is informed and believes and so avers that said account was stated and a draft prepared for delivery, upon conditions and under the circumstances expressed in the letters of certain officials of the Treasury Department, filed by the relator with said petition and marked respectively "Exhibit C. S. F. No. 1," "Exhibit I. H. M. No. 3," and "Exhibit I. H. M. No. 1," which conditions were never fulfilled, but said draft is not dated as said petition alleges. The respondent there-

fore denies the allegations of paragraph numbered 4 except as so qualified.

5. He denies that there has been or is devolved upon or imposed upon the respondent any mere ministerial duty concerning the issuing of a warrant or remitting a draft, but avers that such acts, in the judgment of the respondent, involve careful and mature consideration and discretion. He admits that a general appropriation was made by Congress to repair life-saving stations, &c., as alleged in said paragraph.

6. The respondent admits that a draft was issued and sent to Captain Moore with instructions not to deliver it until an arrangement was made to pay certain sub-contractors and material men whose labor and materials had been used in the work in question; but he avers that said draft was not dated February 15, 1888, as alleged, but a draft was issued and sent to said Moore under the circumstances referred to in paragraph 4 of this answer, and he denies that the respondent has no discretion as to the delivery of said draft, and he avers that he believes that he has such discretion, as Secretary of the Treasury, to refuse to deliver said draft.

7. He admits that said Captain Moore returned said draft
74 as alleged in paragraph 7, but denies that the refusal of the respondent to deliver it is arbitrary, and he avers that the payment of money and the delivery of drafts by him as Secretary of the Treasury is in this instance and is always matter of discretion, except where Congress or the proper courts have settled the rights of the claimant.

8. Respondent has no knowledge as to the merits of the claims mentioned in paragraph 8, but he avers upon information and belief that they are for work and materials used in the work done under the contract in question.

9. In answer to paragraph numbered 9 the respondent says he is advised and he believes that the said amount of $12,536 is not justly due and owing by the said United States to said Mitchell or his lawful assigns for the work done and materials furnished, as alleged in said paragraph 9, and he therefore denies the allegations of said paragraph and avers upon information and belief that a proper and correct statement of said account would embrace the penalties and forfeitures hereinafter mentioned or an amount as damages sustained by the United States, and would show that much less is due than the amount claimed.

10. The respondent says he has no knowledge of the matters alleged in paragraph 10.

11. He admits that he has received notice of the appointment of the relator as receiver, as alleged, but denies that the relator has a right to said draft.

12. Respondent admits that a paper purporting to be an assignment from said Mitchell to the relator, said paper being the relator's "Exhibit B" mentioned in paragraph 12, has been exhibited to the respondent, but he denies that it has the legal sufficiency and effect claimed for it in said paragraph and in paragraph 13, and he denies that it accurately describes the draft which was prepared and made

payable to said Mitchell in the premises, and says he has no such draft as that described in said "Exhibit B."

13. * * * * * * *

75 14. The respondent admits that a paper purporting to be an assignment from said Mitchell to the relator, mentioned in paragraph 14 as "Exhibit C," has been shown to the respondent, but he denies that it has the legal sufficiency and effect, claimed for it in said paragraph 14, and he denies that it accurately described the draft that was prepared and made payable to said Mitchell in the premises, and says he has no draft dated February 15, 1888, and numbered 11130.

15. This respondent, further answering, says that he admits that a suit was begun, as alleged in paragraph numbered 15 in said petition, but he denies that the acts of this respondent therein mentioned were arbitrary, but, on the contrary, avers that all the action taken by himself and he believes that all the action taken by other officials of the Treasury in the premises has been pursuant to official policy and duty. The respondent is informed and believes and he so avers that the draft in question was not drawn until after the said Mitchell agreed that the above-mentioned sub-contractors and material men should be paid out of its proceeds, and it was also expressly agreed by said Mitchell that such draft should be sent to one Captain Moore, who should be charged with the duty of seeing to such payment; that said draft was not prepared for unqualified delivery and was not intended by the officials of the Treasury for delivery when drawn excepting upon said first-named condition, and said condition and agreement have since been repudiated by said Mitchell, as the respondent is informed and believes; and the respondent further says, upon information and belief, that said draft would not have been drawn for the amount expressed therein but for said agreement to pay said sub-contractors and material men.

16. The respondent denies that he has defied or does defy the requirements of the law in the premises, and avers that he
76 believes that this honorable court, upon being fully advised of the facts in the premises, will not interfere with the administrative policy of the respondent, which he has in the exercise of his judgment and discretion adopted and executed in the discharge of his official duties as Secretary of the Treasury.

17. Respondent denies that the relator is without remedy at law, and avers that the relator has a full, adequate, and complete remedy by suit against the Government in the Court of Claims of the United States.

18. The respondent further avers that under the contract in question the work was to have been completed on or before December 31, 1886, and a penalty of $30 per day in default was provided for; that an extension was granted to June 30, 1887, but that the work was not completed until January 24, 1888, and the delay after June 30, 1887, was unauthorized by the Government and unjustifiable and unreasonable, as respondent is informed and believes, whereupon forfeitures and penalties accrued to the Government, as the re-

spondent is informed and believes, in the sum of $6,240. In the opinion of the respondent said forfeitures and penalties may legally be insisted upon by the Government and the amount thereof deducted from said draft, and it is the legal right of the respondent, in his opinion, to secure a restatement of said account or to cancel said draft or to take such other course to secure said penalties and forfeitures to the Government as the laws and the regulations of the Treasury Department may require; and he avers that to leave the relator to his remedy at law would, in the respondent's opinion, enable the Government to avail itself of the said forfeitures or other just damages in the premises.

Respondent further says it satisfactorily appears from information furnished the Treasury Department and he avers upon information and belief that said Mitchell, by various contrivances, assign-
77 ments, and preferences, some of which are being litigated as fraudulent, sought to deprive of their just dues the workmen and material men, whose work and materials have been used in the execution of said contract, and the respondent conceives it to be within the purview of his authority as Secretary of the Treasury to consider the equitable and just claims of persons of whose property the Government has become the beneficiary, and to pursue such course, either by suggestion as to legislation or otherwise, as may be necessary to subserve the ends of justice.

The respondent, answering further, says that he is informed and believes and therefore avers that it is not true, as alleged in the amendment to said petition, that no such proposition or promise or any other proposition or promise looking to the payment of said claimants or the settlement of their demands was ever made to said Maynard or any one else by said Mitchell or by any one for him, either upon consideration of said penalties being waived or upon any other consideration, but, on the contrary, the respondent is informed and believes and so avers that said Mitchell did agree that the draft for said sum of $12,536 might be withheld by said Captain Moore until said sub-contractors and material men were paid, and that the adjustment of the amount to be paid on said contract was conditional upon the satisfaction of said claims, and that the said penalties would not otherwise have been remitted, as stated by the Hon. I. H. Maynard, late Assistant Secretary of the Treasury, in his letter filed by the relator as his "Exhibit I. H. M. No. 1." The respondent avers that he believes the statements of said Maynard contained in said letter—Exhibit I. H. M. No. 1—are true, and upon information and belief he avers that said letter expresses the true grounds for the remission of said penalties; and he further avers, upon information and belief, that the conference between said
78 Maynard and said Mitchell, which led to the said waiver of said forfeitures and penalties, was held at the Treasury Department on the 11th day of February, 1888, prior to the said waiver and prior to the said adjustment by the accounting officers, and that said adjustment was ordered and made subsequent to said conference and pursuant to the understanding reached at said conference, and he further avers that the letter of S. I. Kimball, referred to by

the relator, has no reference to said conference of February 11 last, but refers to a conference as to the forwarding of the draft only; and, upon information and belief, the respondent denies that "said Kimball has admitted to relator's attorney that he, Kimball, did have said draft in his possession at said conference," as alleged in the amendment to said petition—that is, at the conference of February 11, 1888.

And the respondent prays the judgment of the court whether the delivery of a draft for the payment of money out of the Treasury of the United States is or is not in this, as in all cases (excepting where Congress or the proper court has passed upon the merits of the claim), a matter involving the judgment and discretion of the Secretary of the Treasury, and whether the respondent has or has not, in the exercise of his judgment and discretion as such officer, the right to withhold said draft and refuse to pay the amount reported by the accounting officers and leave the claimant to his remedy at law or by legislation under section 191 R. S. U. S., and whether the policy adopted by the respondent as Secretary of the Treasury, as set forth herein, is or is not within the legal and constitutional right of the respondent to establish or adopt.

The respondent therefore prays that said writ be refused and the petition dismissed.

WILLIAM WINDOM,
Secretary of the Treasury.

79 *Replication to Return. Filed June 26, 1890.*

In the Supreme Court of the District of Columbia.

U. S. *ex Rel.* REDFIELD
vs.
WM. WINDOM. } Law, No. 30207.

Now comes the relator and, denying that the matters and things set up by the respondent in the return constitute a sufficient answer to the petition and amendment thereof (which by stipulation stands for the alternative writ), prays judgment of the court that the peremptory writ of mandamus may issue as prayed for, notwithstanding said return.

FRANKLIN H. MACKEY,
Attorney for Relator.

80 *Writ of Mandamus Refused and Petition Dismissed. Filed July 11, 1890.*

In the Supreme Court of the District of Columbia. In General Term.

THE UNITED STATES *ex Rel.* AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } At Law. No. 30207.

This cause came on to be heard upon the return of the respondent to the amended petition filed herein, whereupon, on consideration of said amended petition and return and the arguments of the respective counsel, it appearing to the court that said petitioner is not entitled to the relief sought, it is, this eighth day of July, A. D. 1890, ordered and adjudged that the mandamus prayed for is refused and the petition dismissed.

For the court:

CHARLES P. JAMES,
Asso. Justice.

81 *Petition for Writ of Error, Assignment of Errors, and Allowance of Writ. Filed July 24, 1890.*

In the Supreme Court of the District of Columbia. In General Term.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } At Law. No. 30207.

To the honorable the justices of said court:

The petition of Amasa A. Redfield respectfully shows—

That in this court in general term a final judgment was rendered by which the relator's petition for a mandamus was dismissed. The full record of the cause, duly certified by the clerk of said court, is annexed and herewith presented, from which it will appear that in the said cause was drawn in question the validity of an authority exercised under the laws of the United States within the mean-
82 ing of the act of Congress of March 3, 1885 (23 Stat. L., 443), and also the amount in controversy in said cause exceeds the sum of five thousand dollars, exclusive of interest and costs.

And your petitioner now assigns the following errors in the said record, to wit:

Assignment of Errors.

1. The court erred in dismissing the petition and in refusing to issue the peremptory writ of mandamus as prayed for.

2. The court erred in not deciding that it was the duty of the respondent to deliver to the relator the draft for $12,536 issued in favor of the relator's assignor, William Mitchell, and referred to in the relation.

3. The court erred in deciding that the duty of the respondent in respect of the delivery of said draft was discretionary under the laws and statutes of the United States.

Wherefore your petitioner prays the allowance of a writ of error to the said court, removing the said cause to the Supreme Court of the United States.

83 And your petitioner will ever pray, &c.

AMASA A. REDFIELD,
By his attorney, FRANKLIN H. MACKEY.

A writ of error is allowed and a citation will be issued on filing a bond in the sum of two hundred dollars.

A. B. HAGNER,
Asso. Justice Supreme Court of the District of Columbia.

July 24th, 1890.

84 *Opinion of Justice James. Filed July* 23, 1890.

Supreme Court of the District of Columbia. In General Term.

UNITED STATES *ex Rel.* AMASA A. REDFIELD
vs.
WILLIAM WINDOM, Secretary of the Treasury. } At Law. No. 30207.

JAMES, J., delivered the opinion of the court:

When this case was heard here on demurrer to the petition we held that the relator had shown *prima facie* that the sum of $12,536 was due to him for work done and material furnished in repairing and building certain life-saving stations; that his accounts had been settled by the accounting officers of the Treasury, and were now admitted by respondent to be correct, and that a draft for the amount found due had been made out, but was withheld until the relator should pay certain claims of the sub-contractors and workmen who had assisted in those repairs and constructions. While we held that the case stated by the relator showed that the grounds on which payment was withheld were insufficient, and that nothing seemed to remain but the performance of a ministerial duty by the respondent, we were careful to reserve any question which might be presented by a return. The court said: "It is proper to state that we do not decide that there are no circumstances in which the Secretary of the Treasury can have a discretion to refuse payment even when the proceedings have reached the stage shown in this case.

85 If such grounds of discretion exist they may yet be shown in the return." On this point we may refer to an observation of Lord Denmars in Rex *vs.* The Lords Commissioners of the Treasury. "If, as has been suggested," said his lordship, "it should on any occasion be unsafe, with reference to the public service, to make

a payment of this kind the fact may be stated in the return to the mandamus. 4 Ad. & E., 295."

A return has now been made. It states in effect that the contractor was liable by his contract to a penalty of $30 per day for any default in completing the work within the time stipulated; that he had actually incurred penalties for delays to the amount of $6,240, and that the enforcement of these penalties, by deducting them from the amount of his account, was only waived conditionally—that is to say, on the condition that the relator should allow the disbursing officer, to whom the draft was sent, to pay the sub-contractors and workmen out of the proceeds of the draft. It is claimed in the return that the conditions of the proposed waiver were not complied with by the relator, and that there has been no absolute waiver. On this point the respondent says:

"In the opinion of the respondent said forfeitures and penalties may legally be insisted upon by the Government and the amount thereof deducted from said draft, and it is the legal right of the respondent, in his opinion, to secure a restatement of said account or to cancel said draft or to take such other course to secure said penalties and forfeitures to the Government as the laws and the regulations of the Treasury Department may require, and he avers
86 that to leave the relator to his remedy at law would, in respondent's opinion, enable the Government to avail itself of the said forfeitures or other just damages in the premises."

We think that this return is conclusive of our action in this case. It alleges that there has never been an absolute waiver of the penalties incurred by relator's assignor, and that respondent is now charged with the executive duty of enforcing and has the purpose to enforce those penalties, and that it is his executive duty not to pay the amount found to be due only on the condition that such penalties should be waived.

Whether there has been an actual waiver and loss of these penalties is a mixed question of law and fact which cannot even be considered in a proceeding by mandamus. It is a familiar principle which this court has had occasion repeatedly to state that this writ is applied only to enforce a plain legal duty, and questions of fact are not litigated for the purpose of establishing the existence of a legal duty. When the head of an executive department informs us, in answer to a rule to show cause, that he withholds the final act of delivering a draft, which was prepared for delivery upon conditions, and that he does so in order to enforce and deduct penalties which had not been waived, we cannot in this proceeding try the disputed question whether, by reason of the circumstances, there remains any further executive duty to be performed by him in the premises.

But especially we must consider that it now appears that there is not a clear legal claim, and such a claim and a plain legal duty must unite in order to justify interference by mandamus. Rule discharged and writ denied.

87 *Bond for Writ of Error. Filed July* 23, 1890.

In the Supreme Court of the District of Columbia, the 24th Day of July, 1890.

THE UNITED STATES OF AMERICA at the Relation of AMASA A. REDFIELD *vs.* WILLIAM WINDOM, Secretary of the Treasury. } No. 30207. In Error.

Know all men by these presents that we, Amasa A. Redfield and Horace S. Cummings, his surety, are bound unto the above-named William Windom in the sum of two hundred dollars, to be paid to the said William Windom, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 24th day of July, 1890.

Whereas the above-named Amasa A. Redfield has prosecuted a writ of error to the Supreme Court of the United States to
88 reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Amasa A. Redfield shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

AMASA A. REDFIELD,
By his attorney, FRANKLIN H. MACKEY.
HORACE S. CUMMINGS.

Sealed and delivered in presence of—
C. P. WILLIAMS.

Approved.
A. B. HAGNER.

July 24, '90.

89 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between the United States of America at the relation of Amasa A. Redfield and William Windom, Secretary of the Treasury, being No. 30207 at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, and it being fit that the

error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24 day of July, in the year of our Lord 1890, and of the Independence of the United States the one hundred and fifteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

90 *Citation to the Supreme Court of the United States.*

The United States of America to William Windom, Secretary of the Treasury, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States *ex rel.* Amasa A. Redfield is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety.

E. F. BINGHAM,
Chief Justice.

Service acknowledged this 31st of July, 1890.

JNO. BLAIR HOGE,
Attorney for Respon't.

91 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 29 day of July, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 29 day of July, 1890.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 29 day of July, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Dist. of Columbia supreme court. No. 1301. The United States *ex rel.* Amasa A. Redfield plaintiff in error, *vs.* William Windom, Secretary of the Treasury. Filed September 24, 1890.

Office Supreme Court U. S.
FILED.
DEC 2 1890
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES EX RELATIONE AMASA A. REDFIELD,
Plaintiff in Error,

vs.

WILLIAM WINDOM, SECRETARY OF THE TREASURY,
Defendant in Error.

Mandamus. No. 1,301.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argument for the Relator.

PLAINTIFF IN ERROR.

FRANKLIN H. MACKEY,
Counsel for Relator.

THE LAW REPORTER PRINT.

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES EX RELATIONE AMASA A. REDFIELD,
Plaintiff in Error,

vs.

WILLIAM WINDOM, SECRETARY OF THE TREASURY,
Defendant in Error.

Mandamus. No. 1,301.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argument for the Relator.

(Plaintiff in error.)

This is a writ of error to the Supreme Court of the District of Columbia, brought to correct the error of that court in dismissing the relator's petition for a peremptory writ of mandamus against the respondent, William Windom, Secretary of the Treasury of the United States, commanding him to deliver to the relator a Treasury draft for $12,536, duly assigned to the relator by William Mitchell, the payee.

The facts of the case, as they appear from the record, are as follows:

On the 3d day of September, 1886, one William Mitchell entered into a contract with the United States to furnish

material and perform labor for the Life Saving Service in the construction and repair of certain houses on the coast of Long Island, N. Y. He afterward rendered his accounts for such service, and on the 11th day of February, 1888; said account was adjusted by the Treasury Department, and two days afterwards (February 13, 1888), the following letter was addressed to him by the Commissioner of Customs: (Rec., p. 7.)

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF CUSTOMS,
WASHINGTON CITY, D. C., *February 13, 1888.*

MR. WILLIAM MITCHELL,
No. 24 STATE STREET,
NEW YORK CITY.

SIR: An account has been adjusted in your favor in the amount of $12,536, being due for furnishing the materials and labor, and making additions and alterations to seven (7) Life Saving Station-houses, located on the coast of Long Island, N. Y., under contract dated September 3, 1886. Draft will be remitted.

Respectfully yours,
(Signed) JOHN S. MCCALMONT,
Commissioner of Customs.

Accordingly a draft dated February 15, 1888, for $12,536, payable to the order of said Mitchell, was drawn and sent to New York City, with the following letter, addressed by S. I. Kimball, General Superintendent of the Life Saving Service, to Captains Moore and Merriam, in charge of the office in that city: (Rec., p. 84.)

TREASURY DEPARTMENT,
OFFICE OF GENERAL SUPERINTENDENT,
U. S. LIFE SAVING SERVICE,
WASHINGTON, D. C., *Feb'y 15, 1888.*

Superintendents of Construction, Life Saving Stations, Atlantic and Lake Coasts,
24 State Street, New York City.

GENTLEMEN: Inclosed herewith please find draft No. 11,130, dated this day, and payable by the Treasurer of the

United States, and drawn by that office to the order of William Mitchell, for the sum of $12,536, being the balance due him under his contract dated September 3, 1889, for furnishing material and labor and making additions and alterations to seven Life Saving Stations in the Third District, known as the Oakland, Gelgo, Jones Beach, Zach's Inlet, Point Lookout, Rockaway, and Rockaway Point Stations. In this communication you are informed the following-named persons have filed claims in this office for work and material furnished Mr. Mitchell, and used in the improvements to the stations above named: Benjamin Carpenter, George A. Hooper, Amityville, N. Y., atty., for furnishing tanks for certain stations, $125; William Anderson, George Wallace, Freeport, N. Y., atty., for furnishing materials for painting certain stations and for money expended for express charges thereon, $228; William Waring, George Wallace, atty., Freeport, N. Y., for services as a mason upon certain stations, $262; Vooris & Pettit, George Wallace, Freeport, N. Y., atty., for carpenter work upon certain stations, $1,450.75. R. S. Whipple, F. R. Bellamy, Brooklyn, N. Y., atty., for materials furnished, $1,484.35; Charles Wood, Bergen & Dykman, Brooklyn, N. Y., att'ys, for material furnished, $8,848.77; James S. Baker, keeper Lone Hill Life Saving Station, Sayville, N. Y., for materials furnished, $110.42. A total of $12,503.29. In a conference with the Assistant Secretary of the Treasury yesterday, William Mitchell, who was present, agreed that the draft should be sent to you with the understanding that he would communicate with these people and fix a day when he would meet them in his office and adjust their claims. When this meeting occurs you are authorized to deliver the draft to him.

Respectfully, yours,

S. I. KIMBALL,
General Superintendent.

When the drafts arrived in New York Mitchell declined to recognize the right of the Department to interfere with his private business, and denied that he had ever made the agreement set forth in Kimball's letter. As a consequence delivery of the draft was withheld, and it was returned to the Treasury Department.

In the meantime one of Mitchell's creditors (the firm of Patterson Brothers) having obtained judgment against him in the Supreme Court of New York procured on the 27th of February, 1888, an order of that court in proceedings supplemental to execution whereby Mr. Amasa A. Redfield (the relator herein) was appointed receiver of Mitchell's property, including the draft in question (Rec., p. 8). On the same day Mitchell duly executed to said Redfield an assignment of the draft (Rec., pp. 9 and 10). The relator then requested the Department to deliver the draft to him as assignee thereof. The reply to this request is contained in the following letters:

Exhibit C. S. F., No. 1 (Rec., p. 37).

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April 17, 1888.*

MR. AMASA A. REDFIELD,
Equitable Building, 120 Broadway, New York City:

SIR: Your two letters, dated respectively the 5th and 13th instant, the former enclosing an order appointing you receiver of the estate of William Mitchell, and a copy of his assignment to you, and the latter asking when you may expect to receive the Treasury warrants (drafts) for the work done under his contract with this Department are received.

Before taking action in the matter, I desire to be informed for what creditors of Mr. Mitchell you are trustee.

Some time before you were appointed receiver, Mr. Mitchell agreed with the Department that certain creditors who had furnished labor and material and who had notified the Department of their claims should be paid from the amount due him. It would seem that these parties ought equitably to be paid out of the funds appropriated for the work upon which their labor and material have been expended, and it is the settled policy of the Department in such cases not to permit the money to be diverted to other purposes.

Respectfully, yours,

C. S. FAIRCHILD,
Secretary.

Exhibit I. H. M., No. 2 (Rec., p. 38).

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April 24, 1888.*

Mr. AMASA A. REDFIELD,
Equitable Buildings, 120 Broadway, New York:

SIR: In response to your request of the 18th instant I send you the names of the creditors of Mr. Mitchell, referred to in the letter of this Department, dated April 17, 1888. The amount of the claims and the post-office addresses of claimants are also given, together with the names of the attorneys, so far as known:

Benjamin Carpenter; address, not known; $125; attorney, Geo. A. Hooper, Amityville, N. Y.

William Anderson; address, Merrick, Long Island; $222; attorney, George Wallace, Freeport, L. I.

William Warring; address, Bellmore, Long Island; $262; attorney, George Wallace, Freeport, L. I.

Vooris & Pettit; address, not known; $1,450.75; attorney, George Wallace, Freeport, L. I.

R. F. Whipple; address, Brooklyn, N. Y.; $1,484.35; attorney, F. R. Bellamy, 204 Montague street, Brooklyn, N.Y.

Charles Wood; address, Amityville, N. Y.; $8,848.77; attorney, Bergen & Dykman, 189 Montague street, Brooklyn, N. Y.

James S. Baker; address, Sayville, N. Y.; $110.42.

In this connection, you are informed that in addition to the above there have been received at this Department since February 11, 1888, the date Mr. Mitchell's bill was passed upon by this office, the following claims, some for labor and material, and others for board furnished his workmen:

Patterson Bros.; address, New York City; $2,375.03; attorney, Cornelius Doremus, 206 Broadway, New York City.

William H. Miller; address, Bay Shore, N. Y.; $67.76.

Robert Albin; address, Bay Shore, N. Y.; $3.

William H. Miller; address, Bay Shore, N. Y.; $5.52.

Daniel B. Abrams; address, Oceanus, N. Y.; $20.

Andrew Rhodes, Freeport, N. Y.: $4.15.

Andrew Rhodes; address, Freeport, N. Y.; $4.80.

Andrew Rhodes; address, Freeport, N. Y.; $12.40.
Henry Kremer; address, Bellport, N. Y.; $24.84.
Barney King; address, Bellport, N. Y.; $10.
Philip K. Chichester; address, Amityville, N. Y.; $4.20.
Keeper and crew; address, Blue Point Life-Saving Station, Patchogue, N. Y.; $143.72.
John Albin; address, Patchogue, N. Y.; $3.
Charles E. Wicks; address, Bay Shore, N. Y.; $65.93.
Sidney Smith; address, Centre Moriches, N. Y.; $17.25
Sidney Smith; address, Centre Moriches, N. Y.; $18.28.
Joshua Ryder; address, Centre Moriches, N. Y.; $3.25.
Elbert Chichester; address, Centre Moriches, N. Y.; $116.82; attorney, Nicoll Floyd.
Charles H. Barber; address, Centre Moriches, N. Y.; $93.72; Nicoll Floyd, Centre Moriches, N. Y.

In addition to the foregoing the Department has received notice that by reason of the failure of Mr. Mitchell to perform the stipulations of his contract, the crew of the Smith's Point Life-Saving Station, with a portion of the apparatus, was compelled to occupy a part of the house of Mr. John D. Seaman, of Brook Haven, New York; and that on this account Mr. Seaman claims from the Government the sum of $60.

Respectfully, yours,

I. H. MAYNARD,
Assistant Secretary.

Exhibit I. H. M., No. 3 (Rec., p. 39).

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *May* 28, 1888.

AMASA A. REDFIELD, ESQ.,
Equitable Building, 120 *Broadway*,
New York City.

SIR: In reply to your letter of the 19th instant, referring to the balance remaining unpaid on the contracts of William Mitchell for work upon certain Life Saving Stations, in which you state that you are informed by Mitchell that he

has not consented to the payment by the Department of this balance to any other persons, I have to state that Mr. Mitchell did consent to its retention by the Department until he should furnish satisfactory evidence of the adjustment of the claims of certain parties who had supplied material and labor for him upon the stations and who had notified the Department of the existence of such claims. The names of these persons have heretofore been furnished you. In furtherance of this arrangement, and with a view of preventing embarrassment to Mr. Mitchell, it was agreed that the draft for the balance due on account of the contract for the Long Island stations should be sent to Captain George W. Moore, an officer of this Department stationed in New York, and having an office in the same building with Mr. Mitchell, and that Mr. Mitchell should, upon a day set, have the creditors who appealed to this Department or their representatives present, when Captain Moore was to deliver the draft and payment be made the creditors in his presence. The draft was sent to Captain Moore accordingly, but Mr. Mitchell failing to perform his part of the agreement it was returned to the Secretary of the Treasury, who will hold it until the aforesaid claims are adjusted. The general superintendent of the Life-Saving Service, Mr. McCammon of this city, and Mr. Beardsly of New York, were all present and witnesses of the foregoing understanding, and all of them have recently given assurance that the arrangement made was as narrated above.

Respectfully, yours,

I. H. MAYNARD,
Assistant Secretary.

Being thus refused delivery of the draft the relator filed this petition for a writ of mandamus, on the ground that the duty of the Secretary to deliver, or cause to be delivered, said draft is a purely ministerial one, and that the Secretary has no right to retain the same because of any refusal on the part of Mitchell to pay certain alleged creditors indicated by the Secretary.

By stipulation (Rec., 12) the petition and the order to show cause were agreed to be taken as the alternative writ and thereupon a demurrer was interposed, and the cause

having been certified to the general term for hearing in the first instance, the opinion set forth on pages 15 to 24 of the record was delivered by Mr. Justice James, overruling the the demurrer and directing the respondent to make return. Thereupon, and before the coming in of the return, certain proceedings were had whereby the petition was permitted to be amended and certain exhibits allowed to be filed. (Rec., pp. 25 to 40.) The respondent then made return (Rec., p. 40), and in the hearing the petition was dismissed. (See opinion, Rec., 46.) Thereupon the relator sued out this writ of error, alleging the following assignment of errors:

ASSIGNMENT OF ERRORS.

1. The court erred in dismissing the petition and in refusing to issue the peremptory writ of mandamus as prayed for.

2. The court erred in not deciding that it was the duty of the respondent to deliver to the relator the draft for $12,536, issued in favor of the relator's assignor, William Mitchell, and referred to in the relation.

3. The court erred in deciding that the duty of the respondent in respect of the delivery of said draft was discretionary under the laws and statutes of the United States.

Argument.

The assignment was valid, and passed to the relator the title to the draft.

This case is not within the purview of the Act of Congress of February 26, 1853, restricting the assignment of claims against the United States. The assignment here is one for the benefit of creditors, and was made "*after* the allowance of the claim, the ascertainment of the amount due, and the issuing of a warrant for the amount thereof."

In Erwin *vs.* United States, 97 U. S., 392, it was held that the Act of 1853 applies only to cases of voluntary assignment of claims against the Government, "the passing of claims to heirs, devisees, or *assignees in bankruptcy* are not within the evil at which the statute aimed."

And in Goodman *vs.* Niblack, 103 U. S., 556, the court, approving the language of Erwin *vs.* United States, said:

"The obvious reason of this is, that there can be no purpose in such cases to harass the Government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim and the exigencies of the party who held it, justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of *all his effects*, which must, if it be honest, include a claim against the Government differ from the assignment which is made in bankruptcy? There can be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the Government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the Act of 1853."

So in Hobbs *vs.* McLean, 117 U. S., 567, which I believe is the last utterance of the Supreme Court upon the effect of the Act of 1853, the court say, speaking of the purpose of these sections of the act:

"They were passed in order that the Government might not be harrassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and settlement made. Their purpose was not to dictate to the contractor what he should do to with the money received on his contract after the contract has been performed."

This assignment being on its face for the benefit of creditors it would have been valid if made even *before* the issuing of the warrant, but of course since, as matter of fact, it was made *after* the warrant was issued, the relator is clearly within the benefit of the exception made by the Act of 1853.

That act, as embodied in Section 3477 Rev. Stat. U. S., provides as follows:

"All transfers and assignments made of any claim upon the United States, or any part or share thereof or interest therein, whether also late or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

It was argued below that this statute provides that the assignment of the warrant must be *freely* made, and inasmuch as it here appears that Mitchell's assignment was made in pursuance of an order of court it cannot be said to have been "freely" made, and therefore is not such an assignment of a warrant as is contemplated by the act of Congress. The answer to this is that by the words "freely made" Congress clearly intended such assignments as were not void by reason of any *duress* exercised over the assignor. There have been many assignments made which the assignor would not have made could he have avoided it, but it was never contended in any court that they were not

freely made. An assignment, however unwillingly made, if the same be executed for a proper and legal purpose, is in contemplation of law "freely made;" that is to say, it has not been made under duress.

"Duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform some act under circumstances which deprived him of the exercise of free will." Am. Ency. of Law; title, Duress, and cases cited.

It has been held over and over again that duress cannot be predicated of a legal duty discharged under compulsion.

Knapp *vs.* Hyde, 60 Barb., 80.
Shepherd *vs.* Watson, 3 Caines, 168.
Eddy *vs.* Hermie, 17 Me., 338.
Clark *vs.* Turnbull, 47 N. J. Law, 265.
Stouffer *vs.* Latshaw, 2 Watts (Pa.), 167.
Alexander *vs.* Pierce, 10 N. H., 494.
Vane *vs.* Williams, 50 Conn., 348.
State *vs.* Davis, 79 N. C., 603.
Meek *vs.* Atkinson, 1 Bailey (S. C.), 84.
Dickerman *vs.* Lord, 21 Iowa, 338.
Green *vs.* Scranage, 19 Iowa, 461.
Diller *vs.* Johnson, 37 Texas, 47.

But this very question was considered in the case of Graydon *vs.* Church, 7 Mich., 36. In that case the court, Mr. Justice Christiancy delivering the opinion, said:

"The assignment is sufficiently full and complete to transfer the property in the mortgage to the complainant; and such must be its effect, unless it can be held void, for the single reason that from the recitals and other parts of the instrument, it appears to have been made for the purpose of carrying into effect an order of the Court of Chancery of New York appointing a receiver of the property and effects of the assignor. *If it is to be treated as void for this reason*, it must be on the ground that it was procured by wrongful *duress or coercion* exercised by the court over the assignor. * * * Now, I am not prepared to go this length; and it is to be hoped the time may never come when the courts

of one of the States of the Union shall so far forget the comity due to a sister State as to treat the acts of parties done under the orders of its courts as void on any such grounds, especially when the order is made to operate upon a citizen or resident of the State, and clearly within the jurisdiction of the court making the order. If the act be such as in equity and good conscience the party ought to have performed certainly no wrong has been done. If it were not it is but fair to presume the court would not have ordered it."

An assignment *in bankruptcy* is an assignment made under the sort of compulsion the respondent claims to have been exercised in this case. Now, Erwin *vs.* United States *supra* was a case of just such an assignment made under the *compulsory* process of the bankruptcy act, and yet the Supreme Court of the United States held it valid, and that, too, although the assignment was made *before* the issuing of the warrant.

Moreover, the only person who can set up the defense that the assignment was not freely made is the assignor himself. As long as *he* does not complain it must be presumed to have been his voluntary act.

Again it appears that this assignment was made for a beneficial purpose—to pay the debts of the assignor. In the language of the Supreme Court in Goodman *vs.* Niblack, *supra*, "We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the Act of 1853." The court will necessarily treat an assignment made under the order of a competent court for the benefit of creditors as having been freely made.

The relator sues as assignee, not as receiver, and therefore the court has jurisdiction of the case.

It was claimed in the court below that the relator had no standing in court, because, being a receiver appointed by the Supreme Court of New York, his power and authority was limited to that jurisdiction, and the case of Booth *vs.* Clark, 17 Howard, 332, was cited, wherein it was decided

that a receiver's right to the possession of the property claimed by him is limited to the jurisdiction in which he is appointed, and that he cannot sue for it in a foreign jurisdiction. It is not sought in this case to contravene a rule of law so well recognized. If the relator's right to the draft depended upon his character as *receiver* he would not be here claiming it. The relator does not sue as receiver, he sues as *assignee* of the draft, and the petition shows that he claims and sues as such.

The petition shows that on the 15th day of March, 1888, this identical draft was assigned by the payee, Wm. Mitchell, to the relator, who, by order of the Supreme Court of New York, had been appointed, at the instance of a judgment creditor, receiver of the property of Mitchell.

This assignment passed to the relator the *title* to the draft and the consequent right to its possession; not only in the State of New York, but wherever he might claim it. Indeed, it was not necessary that an assignment in writing of Mitchell's personal property should have been made at all; for the *terms* of the order of the court *passed the title* to personal property, the written assignment was only procured by the relator for the purpose, as was supposed, of avoiding any question which might be raised by the Treasury Department.

Where the *title* to the property becomes vested in the receiver, either by *conveyance* from the defendant or by the *terms of the order* [appointing him], it may be asserted, in a foreign jurisdiction. Kerr on Receivers (Bispham's second ed.), 168 and note to page 206.

Booth *vs.* Clark, 17 Howard, 315, relied upon by the defense below, has no application to the facts of the case at bar. There the receiver had *no* assignment of the property he was seeking to recover. Had he had an assignment the whole tenor of the learned opinion of Mr. Justice Wayne shows that the decision would have been in favor of the plaintiff.

The facts of the case at bar are practically identical with those of the case of Graydon *vs.* Church, 7 Mich., 36, the syllabus of which is as follows:

"When under a creditor's bill, in the Court of Chancery of New York, a receiver was appointed and the debtor, in pursuance of the order of the court, made a general assignment to the receiver of all his property, reciting in it the proceedings had in the cause, and the assignment was made in due form for the transfer of an interest in lands under our statutes: *Held*, That the assignee might file his bill in chancery, in this State, to foreclose a mortgage interest, or to enforce a right of redemption, held by the debtor at the time of the assignment, in lands in this State. The receiver, in such a case, sues not strictly in his official character as receiver, by virtue of his appointment by the Court of New York, but as *assignee holding the legal interest in the property by virtue of the assignment by the debtor.*"

In that case, as in this, the defendants relied upon Booth *vs.* Clark as decisive of their case. Mr. Justice Christiancy, in delivering the opinion of the court, refers to that case in the following language:

"The same principle*, I think, is very clearly admitted in Booth *vs.* Clark, 17 Howard, 315, the case principally relied upon by defendant's counsel as showing that the receiver cannot sue out of the jurisdiction. The court very clearly admit, I think, that if the receiver in that case had obtained an assignment from the debtor by means of the coercive power of the New York Court of Chancery, he might have maintained a suit under the assignment in another jurisdiction, though in such case it seems to be implied he would not be suing officially. See especially pp. 332 and 339.

The assignment to the relator by Mitchell was, by deed, which would pass the title anywhere where the common law is in force, for it is settled doctrine that where a legal

*I. e., that where the receiver has an *assignment* to him of the property claimed, he is entitled to sue for it in a foreign jurisdiction.

title has once vested by a conveyance valid in the place where made, its validity will be recognized everywhere.

Pond *vs.* Cooke, 45 Conn., 122.

The objection to a receiver suing in a foreign jurisdiction when such objection has been sustained, has always been on the ground that the receiver could not, *solely by virtue of his office of receiver*, maintain title to property out of the jurisdiction which appointed him, but if he has in any way *once* acquired title, either by assignment or by an actual reduction to possession of the property claimed by him, his right to sue for it in a foreign jurisdiction has never been denied.

Thus in Milw., &c., RR., *vs.* Keokuk, &c., Packet Co., 108 Ill., 317, a receiver of an insolvent packet company appointed in Missouri, there took possession of a barge of the insolvent and chartered it to a steamboat, and it was brought into Illinois, where it was detained by ice in the river and given up by the captain to the receiver, who took possession. Afterwards it was attached by an Illinois creditor, and on the question as to the right of the parties being raised in the Illinois courts, it was held that the title of the receiver was valid everywhere. "It is the established rule," said the court, "that where a legal title to personal property has once passed and become vested in accordance with the laws of the State where it is situated, the validity of such title will be recognized everywhere."

The same doctrine is declared in Clark *vs.* The Connecticut Pack. Co., 35 Conn., 303, and in Pond *vs.* Cooke, 45 Conn., 126, both of which were cases of receivers asserting their rights in a foreign jurisdiction to property the legal title to which had vested in them either by assignment or reduction to possession. The principle governing these decisions is that the receiver's right is asserted not *as receiver* but as *owner*.

By the law of New York and by the law of the District

of Columbia Mitchell's assignment vested in Mr. Redfield the *title* to the draft in controversy. Suppose Mitchell was the relator here instead of Mr. Redfield, could not the respondent well say "You have no title; you have conveyed it to Redfield by this assignment; Redfield, and not you, is the party entitled to receive it."

Even if the foregoing authorities were not conclusive of the relator's right, the case of Crapo *vs.* Kelly, 16 Wall., 610, leaves no room for doubt upon the question.

In that case the judge of the insolvent court in Massachusetts, proceeding under the provisions of the insolvent act of that State, executed and delivered an assignment of all of the debtor's (Gibbs & Janney's property to Crapo as assignee in insolvency, an office similar in character to that of receiver under the New York supplementary proceedings act: *The debtors themselves executed no assignment personally.* At the time of the assignment the debtor owned a vessel, which was then on the high seas, bound for the port of New York. On its arrival there it was attached by a New York creditor. The question being raised as to the priority of right between the assignee and the attaching creditor, Mr. Justice Hunt delivering the opinion of the Supreme Court of the United States (where the case had come on appeal), laid down this proposition of law:

"If the assignment under which Crapo claims had been the personal act of Gibbs & Janney, it would have passed the title to the vessel wherever she might have been at the time of its execution."

So in the case at bar we say the assignment under which Mr. Redfield claims having been the personal act of Mitchell, the payee of the draft, that assignment passed the title to the draft to Redfield, and entitles him to demand it anywhere.

The duty of the respondent to deliver the draft to the relator is purely ministerial.

The fact of the indebtedness of the United States to Mitchell (the relator's assignor) has been definitely and legally ascertained by the Commissioner of Customs and it is beyond the power of the Secretary of the Treasury to open the account after the warrant issued in payment of the amount found to be due has been issued and assigned.

That the amount of $12,536 has been found due to Mitchell is evidenced by the letter of the Commissioner of Customs (Record, p. 7) see p. 2 of this brief.

The Life Saving Service is a part of the Customs Bureau, and it is the duty of the Commissioner of Customs to settle the accounts thereof.

Section 277, Rev. Stats. U. S., provides that—

"The First Auditor [of the Treasury] shall receive and examine all accounts relating to the receipts from customs, including accounts of collectors, *and other officers of the customs* * * * and after examination of such accounts, relating to the receipts from customs, including the accounts of collectors and other officers of the customs, he shall certify the balances and transmit the same, with the vouchers and certificates, to the *Commissioner of Customs for his decision thereon*, and he shall certify the balances of all *other* accounts, and transmit the same in like manner, to the First Comptroller for his decision thereon."

Section 317, Rev. Stat. U. S., as amended by 19 Stats. U. S., 241, Ch. 69, provides that—

"The Commissioner of Customs shall examine all accounts settled by the First Auditor relating to the receipts from customs, including accounts of collectors and *other officers of the customs*, and certify the balances arising thereon to the Register, and shall perform all the acts and exercise all the powers relating to the receipts from customs and the accounts of collectors and the other officers of the customs, *or* connected therewith, devolved by section two hundred and sixty upon the First Comptroller in regard to other receipts and other accounts."

As to the *effect* of the balances as found to be due by the Commissioner of Customs, Section 191, Rev. Stats. U. S., provides that:

"The balances which may from time to time be stated by the auditor and certified to the heads of departments *by the Commissioner of Customs*, or the Comptrollers of the Treasury, upon the settlement of public accounts, *shall not be subject to be changed or modified by the heads of departments, but shall be* CONCLUSIVE *upon the Executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper department before signing a warrant for any balance certified to him by a comptroller may, however, submit to such comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the comptroller thereon shall be final and conclusive, as herein provided.*"

We have seen that by Section 317, the Revised Statutes give to the Commissioner of Customs the same kind of powers, as to matters belonging to his bureau, as is possessed by the First Comptroller.

Construing this section, it has been held that "It is the duty of the head of a department to issue his requisition for the payment of the amount certified *without regard to his opinion of the merits*, except that he may, before signing the requisition, submit facts affecting the correctness of the balance to the comptroller, whose decision thereon is final and conclusive."

15 Opinions Atty. Genl., 596, 626.
13 " " " 6.
15 " " " 192.
14 " " " 65.
16 Ct. Cls., 335.

And the court below, in its opinion upon the demurrer, has itself said in this case:

"It is not material to inquire whether the Secretary of the Treasury has yet exercised his right to *resubmit* to the

Commissioner of Customs the balance found due in this case. If he proceeded to act without doing so, that balance *remained conclusive upon him.* * * * We do not find, then, that any discretion remains to be exercised by respondent in reference to the balance found due to Mitchell. *The fact of the indebtedness of the United States to Mitchell had been settled then beyond recall when the draft in question was made out and transmitted to Moore.*"

We have, then, these facts before the court.

FIRST. That a balance of $12,536 has been found due to Mitchell by the Commissioner of Customs.

SECOND. That the Secretary of the Treasury (the respondent herein) has not only not resubmitted the account to the Commissioner for revision, but, on the contrary, has issued his warrant and draft for the payment thereof, thereby accepting such balance as the amount due and payable to Mitchell.

THIRD. This warrant so issued has been duly and legally assigned to the relator.

FOURTH. The money is admitted by the respondent (see paragraph 5 of his return) to be in the Treasury appropriated to the payment thereof. (Rec., p. 41.)

What duty then remains to the respondent but the purely ministerial one of delivering this draft to the relator?

That the Secretary of the Treasury has no right to require of the relator, as a condition precedent to the delivery of the draft, that either the relator or Mitchell shall pay certain private debts of their own in which the United States is in no way interested, seems so clear that it is hardly worth discussing the question. The court below has itself furnished us with the reply to the assumption of any such right.

"Whatever executive discretion the respondent may have had in matters between Mitchell and the United States, or the Treasury Department, he had none as to matters between Mitchell and his alleged creditors. His executive

jurisdiction applied to and was bounded by the case between the United States and its contractor. If, *as between himself and the Government*, Mitchell was entitled to a draft for the amount of his compensation—and by making and sending out the draft at all, it was determined that he had that right—then the executive jurisdiction over Mitchell's affairs had reached its end. To all other considerations the Executive was a stranger. If the time for the payment of the Government's own debt had come, and nothing remained to be done, in order to close the transaction between the Government and its creditor, except the delivery of a draft for the money, then the official duty to close it by delivering the draft had accrued, and it was out of his power to qualify that duty by annexing conditions, to be complied with by Mitchell, which were not for the protection of the Government, but for the benefit of third parties." See opinion of court below (Record, p. 22).

Upon what other ground, then, may the respondent refuse to deliver the draft? Is it contained in the respondent's return? We respectfully submit that there is absolutely nothing set up in the return which constitutes a sufficient defence to the rule to show cause why the writ of mandamus should not issue. Let us take it up paragraph by paragraph and see what it amounts to.

Paragraph 1 does not *deny* that the relator is assignee of the draft as alleged. In paragraph 1 of the relations it simply says: "The respondent has no knowledge covering the facts." Of course whatever facts alleged in the relation are not denied by the return must be taken to be admitted.

Paragraph 2 of the return, answering paragraph 2 of the relation or petition, "denies that he has the custody of the draft described in said petition." This is in the first place evasive. The respondent is charged in said paragraph with having "the custody and *control* of the draft." He does not deny that he *had* the custody of the draft at the time of the filing of the petition, and he does not deny that

he has the *control* of it now. Furthermore, the statement that he has not the *custody* of the draft is thoroughly inconsistent with the numerous averments throughout the return that the respondent has the right to "refuse to deliver said draft" and "to withhold said draft," etc.

The law on this subject is that where the statements of the return are inconsistent, "the court cannot know which to believe, and it is an objection to the *whole* return."

Moses on Mand., 214.

"Every intendment is made against a return which does not answer the material facts; therefore it has been held that where it is shown that an ex-officer had the seal of a corporation on the 15th of June, it is not sufficient to avoid the writ, to return that he had no control over or possession of it in July, unless he shows *how* he has parted with the control."

Moses Mand., 213, citing People *vs.* Kilduff, 15 Ill., 492.

"For the same reason it has been held that a return of a justice to an alternative mandamus to send up papers, that at the time of service his fees had not been paid, is no defense against making the writ peremptory, for they may have been paid *since* the service."

Moses Mand., 213, citing People *vs.* Harris, 9 Cal. Reps., 571.

The return to an alternative writ of mandamus must be, as the books state it, "certain," that is to say, it is to be tested by the rules of pleading which construe every plea most strongly against the pleader. Moses cites a number of instances in illustration of the doctrine, some of which are here given.

"It [the return] must either deny the facts stated in the writ, on which the claim of the relator is founded, or must state other facts sufficient in law to defeat the relator's

claim, and these facts should be stated *positively* and *distinctly*; and if, instead of stating facts, the return merely sets out or refers to matters of evidence from which these facts are inferred, it is objectionable."

10 Wend., 20; 35 Barb., 105; 37 Penn. S. R., 237; 32 *Ib.*, 218.

"And where the return stated that the plaintiff was tried and expelled by a "select number of the said society; and in the presence of three deacons and a preacher," but it was not shown of how many this select number consisted, or by what authority they proceeded to try and expel a member, the return was declared insufficient.

"The court say: 'This is a radical defect, for the power of expulsion must belong to the society at large, unless by the fundamental articles, or some by-law founded on those articles, it is transferred to a select number. It ought, therefore, to have been set forth from what source this select committee derived this authority, and in what manner they were selected, in order that the court might judge whether the proceeding had been conducted according to law.'"

Green *vs.* African Methodist, &c., 1 Serg. & Rawle, 254.

"So, too, it has been held not a good return to a mandamus to restore a member of a corporation, that "he consented to be turned out." This was held not a return of resignation."

2 Raymond's Reps., 1304.

"And upon a mandamus to swear in two church wardens, alleged in the writ to be duly elected, a return that they were not duly elected was held bad, unless it also alleged that neither of them were elected."

Ib., 1008.

"And where the writ recited that the plaintiff was duly elected, admitted and sworn into an office, and without just cause had been removed, and the return was that he was

not duly elected, admitted and sworn, and therefore they could not restore him, it was declared a defective return. For if he had been admitted, although not duly elected or sworn, yet the return should show a good cause for the removal. If he had not been admitted the return might be good; or if the return had stated that he had not been elected, admitted or sworn, it would be good."

Douglas' Reps., 79.

"It was held inconsistent to state in a return to a mandamus to certify the election of a recorder, supposed in the writ to be on the 15th day of January, that the corporation was not then duly assembled, and afterwards, in the same return, to state the election of another corporate officer on the 15th of January of the same year, for if it was not duly assembled, it could not have elected such other officer."

The King *vs.* The Mayor of York, 5 Durn. & East's R., 66.

Tested by these rules this whole return is utterly insufficient and should be so declared.

Paragraph 3 admits paragraph 3 of the petition to be true. This paragraph alleges that Mitchell entered into a contract with the United States to furnish, and that he did furnish material and perform labor on certain Life-Saving Stations.

Paragraph 4 of the petition alleges that Mitchell's account was "*adjusted* on the 11th day of February, 1888, by the Treasury Department and the amount found to be *due* to said Mitchell of $12,536." Paragraph 4 of the return which undertakes to answer this paragraph does not deny the statement that this amount "was found to be *due* to Mitchell by the Treasury Department," but it goes on to state that "a draft was prepared" (and we must assume that it was prepared in consequence of this amount having been found *due* to Mitchell, "for delivery upon conditions and *under the circumstances* expressed in the letters of certain officials of the Treasury Department filed by the relator

with said petition and marked respectively Exhibit C. S. F., No. 1, Exhibit I. H. M., No. 3, and Exhibit I. H. M., No. 1, which conditions were never fulfilled." In the first place it is settled law that the *facts* of a return "should be stated positively and distinctly, and if instead of setting out these facts, the return merely *sets out or refers to matters of evidence from which these facts are to be inferred*, it is objectionable. In support of this proposition, the soundness of which will scarcely be controverted, see cases cited in the foot-note.* How can the court ascertain what are the "conditions and circumstances" expressed in these letters except by *inferring* from them what it is the respondent means?

But supposing it were allowable to refer to these exhibits for the purpose of gathering *by inference* what were the "circumstances" under which the draft was "prepared for delivery," and the "conditions" upon which it was to be delivered, let us see what there is to be inferred. We find a letter, Ex. I. H. M., No. 1, from one Isaac H. Maynard, who, at the time of writing the letter, was a private citizen; from this letter it is possible to *infer* that certain parties having claims against Mitchell of "the merits of which the respondent has no knowledge" (see paragraph 8 of the return, Rec., p. 41), filed these claims in the Treasury Department, and thereupon we are told that certain alleged penalties were remitted and $12,536 allowed Mitchell in order that he might be able to pay these claimants and that

* Argumentative inferences in a return, or sworn allegations which are merely constructive deductions, and which, if false, are not indictable as perjuries, cannot be treated as presenting distinct issues of fact. Comm'r *ex rel.* Middleton *vs.* Commissioner, &c., 37 Penn. St Rep., 237.

Respondents are bound to return plain and distinct answers to all the material allegations in a writ of mandamus, and in this light every part of the return is to be judged. If a confession and avoidance to a plea of fraud be intended, all the necessary facts should be distinctly stated and not left to inference. *Ibid.*

Every allegation of a return must be direct, and be stated in the most unqualified manner, not inferentially or argumentatively, but with certainty and plainness. Commonwealth *ex rel.* Thomas *vs.* Commissioners, &c., 32 Penn. St. Rep., 218. See, also, Commercial Bank *vs.* Canal Comm'r, 10 Wend., 20; The People *vs.* Baker, 35 Barber, (N. Y.), 105.

"it was agreed" (who by, or with whom, or upon what consideration is not stated, *non constat* it may have been an agreement between Maynard and Kimball,) that the draft should be sent to the representative of the Life-Saving Service in New York, and the creditors were to meet Mitchell there, "and they were to be first paid or satisfied out of the proceeds of the draft, and if this was not done the draft was not to be delivered."

Observe that it is nowhere alleged that these penalties were remitted in consequence of any *agreement of Mitchell's* that he would pay these claimants *if they were remitted.* The respondent's return upon this point is that "he believes the statements of said Maynard contained in said letter—Ex. I. H. M., No. 1—are true, and upon information and belief he avers that said letter expresses the true grounds for the remission of said penalties." Referring to "said letter" we find no allegation of any agreement on the part of Mitchell (which would have been *void* if made) that *if* these penalties were remitted he would pay the claimants, all that is ventured is that "it was certainly a very material question in deciding to remit the penalties incurred by the contractor that these claims were to be paid out of the funds *which would be thus provided.*" This was no doubt a very nice arrangement for "providing" a fund to pay non-creditors of the Government, but the first thing to be said in regard to it is that Assistant Secretary Maynard had nothing to do with adjusting Mitchell's account. It was altogether out of his jurisdiction. The First Auditor is the officer appointed by the law to adjust these accounts (Sec. 277, R. S. U. S.), and his adjustment is then examined by the Commissioner of Customs who, after performing this duty certifies the account, and this account, so certified, "shall not be subject to be changed or modified by the heads of Departments, *but shall be conclusive upon the Executive branch of the Government.*" (See the former opinion of the court upon this point, XVIII Wash. Law Reporter, p. 290; Record, p. 15.)

In the method of settlement of this account under the law and practice of the department the vouchers and certificate that the work has been performed having been sent by Captain Moore to Kimball, the Superintendent of the Life-Saving Service, it became his duty to pass upon them and forward them to the First Auditor of the Treasury. The First Auditor, having passed the account, forwards it to the Commissioner of Customs by whom it is then sent, if approved, to the Register. The Register then files the vouchers and sends a statement of the account to the Secretary of the Treasury.* If the Secretary thinks the account incorrect or has any reasons to suggest why it should be modified he returns it under the provisions of Section 191, R. S. U. S., to the Commissioner of Customs for restatement. The account then goes through the same channel on its way back to the Secretary. When returned the Commisioner's statement becomes "conclusive" upon the Secretary, who, thereupon, issues his warrant upon the Treasury.

It is further to be observed that nowhere in the letters of advice forwarded by the department to Moore, Mitchell, or the relator, which are filed as exhibits in this case, is there the slightest intimation as to *penalties* having been incurred by Mitchell or their remission having been made because of any *agreement* of his. And the court must also conclude that nowhere is this alleged agreement *of record in the Department*, for if it is it was the respondent's duty to have produced it in his return and he unquestionably would have done so. Indeed, the respondent *negatives* any presumption of a record of the matter by returning that he is "informed and believes," from *unofficial* information given him by an ex-official (Maynard) that he, Maynard, was induced by certain *reasons* to remit the penalties. We have already seen that

*This is provided by Section 313 Rev. Stats. U. S., which declares—"It shall be the duty of the Register * * * to transmit to the Secretary of the Treasury copies of the certificates of balances of accounts adjusted."

it was no part of Maynard's duty to remit these alleged penalties or to pass upon the account at all. Hence, his statement in regard to the matter is, if we may be allowed the expression, *doubly* unofficial.

But suppose that Mr. Maynard or even the Commissioner of Customs had waived the alleged penalties under the supposition that Mitchell would pay the claimants and Mitchell had made the nude pact, either before or after they were waived, that he would do so, does that furnish a justification for the Secretary of the Treasury to refuse to deliver the draft until Mitchell paid these men? He might with as much show of reason say, "The Commissioner of Customs adjusted this account and allowed as much as he did, because Mitchell promised that out of the money 'which would be thus provided,' by the remission of those penalties he would subscribe a liberal sum to the *poor* fund, and now that he has repudiated his promise, I refuse to deliver him the draft." The answer to all this is—the Secretary of the Treasury *after* he has signed the warrant has nothing whatever to do with the *reasons* of the Commissioner for allowing the particular sum found to be due; *before* the Secretary signs the warrant he may submit to the Commissioner "any facts in his judgment affecting the correctness of the balance," but if he proceeds to issue the warrant without doing so "that balance," as the court below has said, "remains conclusive upon him." Therefore, we say with Mr. Justice James that "the fact of the indebtedness of the United States to Mitchell in the sum of $12,536 was settled *beyond recall*, when the draft in question was made out and transmitted to Moore." *See opinion* of court below, record, p. 21.

The very purpose of the act of Congress, Sec. 191, Rev. Stats., seems to have been to provide for a period of time when the discretionary duty of the heads of departments should end and their ministerial duty begin. It seems to recognize the fact that the settled and adjudicated accounts of the Treasury Department ought not to be ripped open

by the head of a department according as the humor seizes him, but that a time should arrive when they should be forever settled; and what other time should that be than when the warrant or draft is issued for the payment of the balance found due? If this were not so what protection would there be to the assignee of the draft? The Act of 1853 declares that the draft may be assigned. Does not that act by making it so assignable deny to the Secretary the power to open the account after the account has been settled and the draft issued.

The 5th, 6th, and 7th paragraphs of the return merely deny that the duty of the respondent in respect of this draft is ministerial, which is the very question of law in dispute, and I therefore pass them without notice.

The 8th paragraph is a curiosity. It undertakes to answer the corresponding paragraph of the petition which alleges these claims against Mitchell, to be "unlawful, outrageous and unjust." In response to this plain and direct charge, the respondent says "he has no knowledge as to the merits of the claims." As all that which is not denied is admitted under the rules of pleading in mandamus, the respondent stands before the court admitting that these claims are "unlawful, outrageous, and unjust," and yet he insists that he ought not to be required to deliver this draft until they are paid!

The 9th paragraph is still another curiosity. In it the respondent states that "he is advised and *believes* that the said amount of $12,536 is not justly due and owing by the United States to said Mitchell," &c.; and yet he says that money *not* due and owing by the United States to Mitchell, ought to be paid to Mitchell, provided Mitchell will pay certain of his (Mitchell's) creditors? These are what the books call "inconsistent" averments, and therefore they vitiate the whole return. See authorities cited on pages 218, 22, of this brief.

But the respondent cannot be permitted to say that the amount of $12,536 is not owing to Mitchell by the United States, because, as the court below has well said, "the fact of the *indebtedness* of the United States to Mitchell, had been settled *beyond recall*, when the draft in question was made out and transmitted to Moore."

Paragraph 10 of the petition not being denied, is admitted. This paragraph avers the insolvent proceeding in New York.

Paragraph 11, while admitting the assignment by Mitchell of said draft for $12,536 to the relator, denies that the relator "has a right to said draft." This is insufficient; the respondent must show *why* the relator is not entitled. See Commonwealth *vs.* Pittsburg, 34 Pa., 496.

The same rule applies to the **12th paragraph** of the return. It denies "the legal sufficiency and effect claimed for" the assignment by Mitchell to the relator, but fails to show wherein it is insufficient. As was said in Commonwealth *vs.* Pittsburg, *supra* (cited in Moses on Mand., 213): "Where a mandamus is issued requiring a municipal corporation to provide for the payment of the interest on its bonds, and the writ avers that the relator is *assignee* and owner of the bonds, a return averring simply that the bonds were not transferred in accordance with the acts of assembly is insufficient; *it should show wherein the supposed illegality of the transfer consists.*"

Paragraph 13 of the petition avers the validity of the assignment, because, among other things, of its being for the benefit of creditors. (See Goodman *vs.* Niblack, 102 U. S., 556; Erwin *vs.* U. S., 97 U. S., 392.)

The corresponding paragraph of the return, by not denying, must be taken to admit this averment.

Paragraph 14 of the return is obnoxious to the same objection made to paragraph 12. It denies the sufficiency of the assignment without showing in what respect it is insufficient. Perhaps we should also notice the averment

made in this and several other paragraphs, that the respondent says "he has no draft dated February 15, 1888, and numbered 11,130."

An established rule of pleading is that where there is a misnomer or misdescription alleged, the pleader alleging it must "tender a better writ;" that is to say, he must state the true name or true description. A return to an alternative writ of mandamus is no exception to this rule. The respondent should, if he denies the relator's description, show what the true description is. But let us see how the case stands before the court as matter of fact:

In the first place, Exhibit G. W. M., No. 1 (Rec., p. 32), contains the sworn examination of Capt. G. W. Moore, the official to whom the draft was sent, as the respondent admits. On this examination Captain Moore holds the draft in hand (see p. 34, Record), and avers that the number of the draft is 11,130, and the date February 15, 1888. In addition to this the court will find in this same exhibit, at page 34 of the record, a letter addressed by S. I. Kimball, the General Superintendent of the Life-saving Service, to Captains Moore and Merriam and inclosing the draft for $12,536. This letter is dated *February 15, 1888*, and in it Kimball says: "Gentlemen: Inclosed herewith please find draft, **No. 11,130,** dated **this day** and payable by the Treasurer of the United States and drawn by that office to the order of William Mitchell, for the sum of $12,536, being the balance *due him* under his contract, dated September 3, 1886, etc. * * * In a conference with the Assistant Secretary of the Treasury *yesterday* [*i. e.*, February 14], William Mitchell, who was present, agreed that the draft should be sent to you with the understanding that he would communicate with these people [*i. e.*, the claimants] and fix a day when he would meet them in his office and adjust their claims. When this meeting occurs you are authorized to deliver the draft to him."

This letter and Moore's testimony are referred to in the petition and made part thereof. The respondent does not

deny their authenticity. It is plain that their averments, so far as they support the relator's position should, if possible, be explained away by the respondent. He does neither, and yet ignoring the statements of his own officials he says the draft "is not dated February 15, 1888, and numbered 11,130." If the date and number of the draft are *material* and the relator does not give the true date and number, why does not the respondent state them? Such evasiveness deserves the condemnation of the court. *Non constat* if the respondent had answered fully as to this matter his objection would be found as groundless as his defense that he has not the "custody" of the draft.

If, however, it be a fact that Moore and Kimball give the wrong date and number of the draft which was drawn payable to Mitchell's order, and thereby have misled the relator in his description of it, it is, nevertheless, admitted by the respondent that he has *a draft for* $12,536 *drawn to the order of Mitchell*, being the draft which we are entitled to have delivered to us. Its date and number is immaterial. Indeed, the court may require the respondent to issue us a *new* draft, payable to the relator's order. But be that as it may, we are at least entitled to the draft which was drawn to Mitchell's order and which was sent, as the respondent admits, to Captain Moore for delivery to Mitchell. When, therefore, the respondent seeks to evade the strong arm of the court, stretched out to compel him to perform his official duty, by means of this uncandid averment as to immaterial dates and numbers, the return savors of bad faith to the court. Why does the respondent seek to keep as a secret the date and number of this draft? Is it because if it were known the court would see that there is really no variance, and if there is that it is but a trifling one?

The 15th paragraph presents us again with the oft repeated assertion of the respondent's right to annex a condition to the delivery of the draft; a right which he clearly

does not possess. It also loses sight of the admitted fact that Mitchell is no longer the owner of the draft; that he has been judicially rendered *incapable* of carrying out this alleged agreement which, even if he made it, is on its face a *nudum pactum*. The respondent seems to forget that it is not Mitchell who is here but an assignee for the benefit of Mitchell's creditors (and creditors, too, who are a part of the very men whom the respondent alleges Mitchell promised to pay). This assignee is accountable to a court of competent jurisdiction to whom the rest of these claimants, whom the respondent seems so solicitious about, although he knows nothing of "the merits of their claims," may go for redress. The averment of this paragraph that said draft "was not prepared for *unqualified* delivery" and that "said draft would not have been drawn for the amount expressed thereon but for said agreement to pay said subcontractors and material men" seem calculated to shock a man of ordinary ideas as to departmental methods. It is not worth while to discuss the question, however, for whatever may be the respondent's ideas with respect to his *discretionary* duties in signing drafts for money alleged not to be due the contractor provided such contractor will turn over such money to non-creditors of the Government and in respect to whose claims the Secretary admits he "knows nothing," the law declares that the action of the Secretary of the Treasury in issuing a warrant for the payment of an account adjusted by the auditor and certified by the Commissioner of Customs, is not a *qualified* act but that it carries with it but one signification, and only one (a signification which no power less than Congress can change), viz: it is the establishment, "beyond recall," of the fact of the indebtedness of the United States to the party named in the warrant.

The 16th and 17th Paragraphs are so plainly overruled by the opinion of the court below on the demurrer, from which the respondent did not appeal, that it is needless to further notice them.

Paragraph 18. Inasmuch as it is upon the statements of this paragraph that the court below based its refusal of the writ, it is proper here to make some allusion to the reasons given by that court for its action.

It holds the return to be sufficient because "it states in effect that the contractor was liable by his contract to a penalty of $30 per day for any default in completing the work

Mitchell. He will not undertake to say that they were, *as a matter of fact*, incurred; because if he had so stated his averment (which is not sworn to) would either be false, or the *sworn* averment of Capt. Moore in Exhibit G. W. M., No. 1, (made part of the petition) would be false. Capt. Moore states that he and Capt. Merriam "had charge of this work which was done by Mitchell," and that Mitchell performed the work "according to the contract and specifications, except in some authorized departures" (Rec., p. 36). Mitchell also swears to this (Rec., p. 31); both of these exhibits and their averment are made part of the petition, and the respondent, by failing to deny their statements, directly

The certain test of the sufficiency of a return to a writ of mandamus, is this: Can the facts set up as a defense, if untrue, be the basis of a suit for a false return? To be so they must be stated with such certainty as to be indictable as perjuries, otherwise no distinct issue of fact is raised. Connor ex rel. Middleton vs. Commissioners, etc., 37 Penn. St. Rep., 23, (see page 24 of this brief.) Now applying this test to the return in this case, where can be found any material allegation stated with such certainty as to be indictable as a perjury if false? What recourse has the relator if the court will *infer* this or that to be the case "in effect" as is stated by the learned judge who delivered the opinion below. Can the relator set up in a suit for a false return that the respondent stated "in effect" so and so? May a man be indicted for having stated "in effect" that which is charged to be false? If not where can be found in the return those certain, unqualified, uninferential statements which will amount to a sufficient answer. If they are there the relator's counsel has been unable to find them.

Paragraph 18. Inasmuch as it is upon the statements of this paragraph that the court below based its refusal of the writ, it is proper here to make some allusion to the reasons given by that court for its action.

It holds the return to be sufficient because "it states in effect that the contractor was liable by his contract to a penalty of $30 per day for any default in completing the work within the time stipulated, that he had actually incurred penalties for delays to the amount of $6,240, and that the enforcement of these penalties, by deducting therefrom the amount of his account was only waived conditionally—that is to say, on condition that the relator should allow the disbursing officer, to whom the draft was sent, to pay the subcontractors and workmen out of the proceeds of the draft. It is claimed in the return that the conditions of the proposed waiver were not complied with by the relator, and that there has been no absolute waiver," and then the opinion goes on to state that if this be the fact and of course the return is conclusive of it, the answer is sufficient. ✳

We respectfully submit that nowhere in this paragraph, or elsewhere in the return, are the facts as stated by the court below. In the extract above given from its opinion the respondent only ventures to assert that he is "informed and believes" that penalties were incurred by Mitchell. He will not undertake to say that they were, *as a matter of fact*, incurred; because if he had so stated his averment (which is not sworn to) would either be false, or the *sworn* averment of Capt. Moore in Exhibit G. W. M., No. 1, (made part of the petition) would be false. Capt. Moore states that he and Capt. Merriam "had charge of this work which was done by Mitchell," and that Mitchell performed the work "according to the contract and specifications, except in some authorized departures" (Rec., p. 36). Mitchell also swears to this (Rec., p. 31); both of these exhibits and their averment are made part of the petition, and the respondent, by failing to deny their statements, directly

and unequivocally, must be taken to admit them. They are, therefore, inconsistent with his "information and belief" on the same subject, and the latter under the rule as to inconsistency in the return is, therefore, if for no other reason, impotent as a matter of defense.

But we may well ask the question, What right had the Treasury Department to require such conditions precedent of Mitchell before it waived the penalties incurred, to wit, that he should pay his creditors? We submit, with all the emphasis that we can give to the assertion, that the Department *is not to be listened to as having made such an arrangement* with a creditor of the United States. What benefit does the United States receive from such a compact? Is it not a compact *contrary to public policy*, in violation of law, and absolutely void? Can the respondent be heard to say especially in this vague way that "he is informed and believes" that an illegal and void agreement between an officer of the Government and one of its creditors was made whereby the Government was to be made to pay *more* to one of its creditors than was justly due, provided said creditor would pay to third parties certain amounts of money upon claims which the respondent admits he does not know the merits of, and respecting which he will not undertake to deny the relator's averment that they are "unlawful, exorbitant, and unjust!"

Furthermore, if it be true that penalties were incurred by Mitchell, it is plain that they were not *enforced* against him; that for some reason, good or bad, they were waived. Even if we accept the respondent's statement that he is "informed and believes" that they were remitted, because, as Maynard *supposed* Mitchell would pay these claims "out of the fund which would be thus provided." No *agreement* on the part of Mitchell as to this remarkable disposition of Government money for the benefit of its non-creditors is shown. But it *is* shown that he did his work; that he presented it for supervision; that he handed in his accounts; that they

were passed upon by the proper accounting officers; that a balance was found due; that this balance was certified to the Secretary of the Treasury, who found no fault with it, and who issued his warrant for the amount so certified. Did not the indebtedness of the United States to Mitchell thereupon become fixed "beyond recall?" It seems preposterous to say that a subsequent Secretary of the Treasury may undo the act of former accounting officers by ripping up in this way a finally adjudicated account. If he can, then we ask *when* is an account ever finally adjudicated by the Department? At what moment of time does the duty of the Secretary in respect to delivering the draft *cease* to be discretionary and become ministerial? There is no such moment if the respondent is right in his contention.

There is no doubt that the purpose of the Act of 1853, which forbids the assignment of claims against the Government, before the issue of the warrant, was to prevent the accounting officer from being embarrassed by the assignment in his settlement of the creditors' account.* But when that account was once adjudicated and settled and the warrant issued, the indebtedness of the United States became, under the terms of the statute (R. S. U. S., 161), and the decisions of the courts unalterably fixed.

15 Op. Atty. Genl., 192.
14 Op. Atty. Genl., 65.
16 Ct. Cls., 335.
15 Op. Atty. Genl., 596, 626.
13 Id., 6.

If this were not so, it would, as we have seen, be useless to provide that the warrant may be assigned; for no man, with the knowledge that even *after* the warrant had been

*They were passed in order that the Government might not be harrassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and settlement made. Their purpose was *not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.*
Hobbs *vs.* McLean, 117 U. S., 567.

issued and assigned the Secretary might re-open the account, would accept an assignment with such a danger ahead of him. Is a *bona fide*, assignee without notice of any infirmity in the draft to be denied its payment because of the existence of a previous agreement of the assignor (unknown to him, and with nothing in the records of the Department to advise him of it) to pay a number of persons not even named, who are non-creditors of the Government, and of the merits of whose claims he knows nothing. Let us not forget that the issue of this draft was an acknowledgment of the indebtedness of the United States to Mitchell in the amount named in the draft, and that the law made it assignable. Can the maker of the assigned instrument set up as a defense to its payment a prior verbal agreement of the original payee to pay third parties who were in no way privies to the agreement, and who, so far as the record shows, are not insisting upon payment.

It should be added that the respondent's attitude towards the court in respect to these alleged penalties is altogether evasive and equivocal. He does not say that he *intends* to open this account and enforce these penalties, and therefore refuses to deliver the draft until the account can be opened and re-settled, but he intimates that, if the court will only keep its hands off, the relator will be compelled to avail himself of his remedy at law (as if mandamus were not a remedy at law), and when the relator does this, why then it will "*enable* the Government to avail itself (provided the Government at that time wants to), of the said forfeitures *or other just dumages* (?) in the premises.*

* Let us see if the United States in a suit against it by the relator in the Court of Claims could "avail itself of the said forfeitures." If such a suit were brought the relator would of course offer in evidence the account as adjusted by the Department in which this sum of $12,536 was found due to Mitchell. Would the Government be allowed to go behind this adjusted account to show forfeitures and penalties? Certainly not. If anything is well settled in the law of suits against the United States in the Court of Claims it is that these adjusted accounts are *final and conclusive* upon the Government and its officers. How, then, could the Government "avail itself of the said forfeitures?"

The rest of this paragraph is taken up with a reiteration of prior statements as to Mitchell having agreed to pay certain claimants.

No one can place his finger upon any portion of this return, and say "Here is where the respondent states the consideration which moved to Mitchell for making this promise," even if we admit such promise was ever made. If it be said that the return states, what in fact it does not, viz., that the consideration was the remission of these alleged penalties, let us see what sort of a "consideration" that was. Mitchell, it is said, incurred penalties amounting to $6,240. The "claims" filed against him amounted to $12,503.29. (See Kimball's letter, Ex. G. W. M., No. 1, Rec., p. 34.) Now, then, in order to avoid having $6,240 deducted from the amount otherwise due him, which, however, would still leave him $6,296, we are told that Mitchell actually agreed to surrender the proceeds of the whole draft save and except the trifling sum of $32.71; for deducting the amount of the claims, $12,503.29, from the amount of the draft—$12,536—that will be the amount left. In other words, to escape forfeiting $6,240, he agreed to resign his right to $12,503!

This is the "consideration" which he received for making such an alleged promise, and a promise made, too, in favor of persons whose demands he alleges, and the respondent by the pleadings admits, are "unlawful, exorbitant, unjust." Furthermore, the respondent expressly states, as to these *claims*, that "he has no knowledge as to their merits" (par. 8 of return, Rec., p. 41). Such a proposition requires something more than a mere allegation of "information and belief," gathered from the vague statements contained in certain letters referred to as the source of information and from which such a promise can only be inferred, and inferred, too, against *sworn* statements in the petition to the contrary. Facts must be specifically shown not, as we have seen (p. 24 note, this brief), by a reference to documents from

which such facts are only to be inferred but by the distinct and positive statement of the respondent himself. Moreover, there must be no evasion or equivocation, there must be no inconsistencies. The return must be technically *certain* and be tested by the ordinary rules of pleading, both as to form and substance. Test this return by these rules and it will be found, I respectfully submit, obnoxious to every one of these requirements.

Should the court refuse to grant this writ of mandamus it is plain we are at the mercy of the respondent, who may retain this draft indefinitely, for Mitchell cannot pay the claim, inasmuch as he is admittedly insolvent, neither can the relator, for as assignee he has no authority to do so. To invite them to attempt even to do so would be asking them to lay themselves liable to the pains and penalties of contempt of the orders of a sister court of competent jurisdiction, that court having taken charge of Mitchell's affairs. Moreover, neither Mitchell nor the relator, be it remembered, are seeking to escape payment of Mitchell's *just* debts. The proceeds of this draft Mitchell has appropriated by his assignment to the very purpose of paying his just debts, and the relator has undertaken as the care-taker of the fund to see that it is so applied. So, that we come to this: Whether Mitchell agreed to pay these claimants or not, his agreement has been rendered *impossible* of performance by the act of a court of competent jurisdiction which has taken the control of his affairs out of his hands and made him assign this draft for the benefit of his creditors. These creditors, the record in this case shows, consist of part of the very men who filed their claims with the Treasury Department. (See Maynard's letter, Ex. I. H. M. No. 2, in which Patterson Brothers, who instituted the New York proceedings, are numbered among the claimants.) That court is a forum likewise open to these other claimants. Let them go there, have the merits of their claims passed upon, and get the benefit of the assignment, if they are en-

titled to it. Certainly, the respondent has no machinery at his hands, even if he has the jurisdiction, to adjudicate these claims. But he is going out of his bailiwick; he has no right to extort a promise of this sort from the creditor as a condition precedent to the settlement of his account or the delivery of his property, and such a promise, if made, is *void* upon every principle of law. To sustain the respondent in his contention is to hand over the jurisdiction of the judicial branch of the Government to the Executive; to erect the Treasury Department into a court of equity, and clothe with the judicial ermine an individual who, always without judicial facilities and responsibilities, may frequently be without either judicial impartiality or ability. It is submitted, therefore, that the return shows no valid and sufficient reason for refusing to deliver to the relator this draft, of which he is the lawful assignee. That being the case the duty to deliver it is *purely ministerial*, and the writ of mandamus should issue to compel the performance of that duty.

Respectfully submitted,

FRANKLIN H. MACKEY,
Counsel for Relator.

Office Supreme Court U. S.
FILED,
OCT 7 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES EX RELATIONE AMASA A. REDFIELD,
Plaintiff in Error.

vs.

WILLIAM WINDOM, SECRETARY OF THE TREASURY,
Defendant in Error.

Mandamus. No. 1301.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Motion by Plaintiff in Error to Advance the Case Under Rule 26, Clause 6, and for a Speedy Hearing.

And now comes the above-named relator, and moves the court to advance this cause and for a speedy hearing thereof on the following grounds:

1. The petition in this case is for the peremptory writ of mandamus against the respondent as Secretary of the

Treasury. It was filed in the court below December 23, 1889, and on the same day a rule to show cause why the peremptory writ should not issue was granted by one of the justices of the special term. On January 14, 1890, a stipulation was filed that the petition and the rule to show cause should "be taken as and be considered an alternative writ of mandamus." And on the same day the respondent demurred to the writ. January 16 the relator moved for judgment, notwithstanding the demurrer, and on the next day the motion was certified to the General Term for hearing in the first instance.

On May 7, 1890, the demurrer was overruled by the General Term and the respondent directed to make return, which was accordingly made June 26, 1890. On the hearing of the return July 11, 1890, the rule for a peremptory writ was discharged and the petition dismissed.

2. The petition being for mandamus against a government official whose tenure of office is of uncertain duration and who, should his office terminate by death, resignation or removal, would, under the decisions of this court abate the suit, it would seem that the relator is entitled as of course to a speedy hearing, and such the relator's counsel understands to be the practice of the court in similar cases.

3. The question presented involves the legal right of the petitioner to a draft for $12,536, issued by the respondent to the relator's assignor. The draft was issued February 13, 1888, and as no interest is payable upon the draft the relator, besides the risk of the suit abating, is losing at the rate of $752 a year by the delay incident to judicial proceedings, in which respect the case differs from ordinary suits where interest is allowed in the final judgment from the time the demand became due and payable.

4. Another potent reason for advancing the cause is that it is a question whether the Statute of Limitations is not

running against the relator, so that, if it be the case that mandamus is not his remedy, it becomes important that it should be known in time to permit some other proceeding. It is now (Oct. 14, 1890), two years and eight months since the draft was issued.

FRANKLIN H. MACKEY,
Attorney for Plaintiff in Error.

To WILLIAM WINDOM, Secretary of the Treasury:

You will please take notice that I shall, on Tuesday the 14th day of October, A. D. 1890, submit the motion, of which the foregoing is a copy, to the court for its judgment thereon.

FRANKLIN H. MACKEY,
Attorney for Plaintiff in Error.

THE LAW REPORTER PRINT.

This Court has said that mechanics' liens are founded in natural justice.

Provident Institution vs. *Jersey City*, 113 U. S., 516.

If, then, the lienholders in this case were prevented from perfecting their liens, under the law of New York, by the fact that the structures, into which their labor and materials had gone, were the property of the United States, they certainly have the right to treat the money due the contractor as representing that labor and those materials.

Gibson vs. *Warden*, 14 Wall., 251;
Olcott v.s *Bynum*, 17 Wall., 63;
Markey vs. *Langley*, 92 U. S., 155.

As the owner of the buildings, the Government cannot be sued in the courts of New York, and the contractor, Mitchell, is insolvent; if the fund is not affected with a lien for the protection of the lienholders, there must be a failure of justice, and hence equity; following the great principle of the Roman law that no one shall be entitled to enrich himself at the expense of another, will imply a lien on the fund, because natural justice calls for it as loudly as it does in the case of the unpaid vendor of real estate, or in the case of improvements made in the belief of ownership of the thing benefited, or in numerous other cases familiar to courts of equity.

Story Eq., Sec. 1237;
Perry vs. *Board of Missions*, 102 N. Y., 99;
Haggerty vs. *Palmer*, 6 Johns., Ch. 437.

Supreme Court U. S.
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Supreme Court of the United States.

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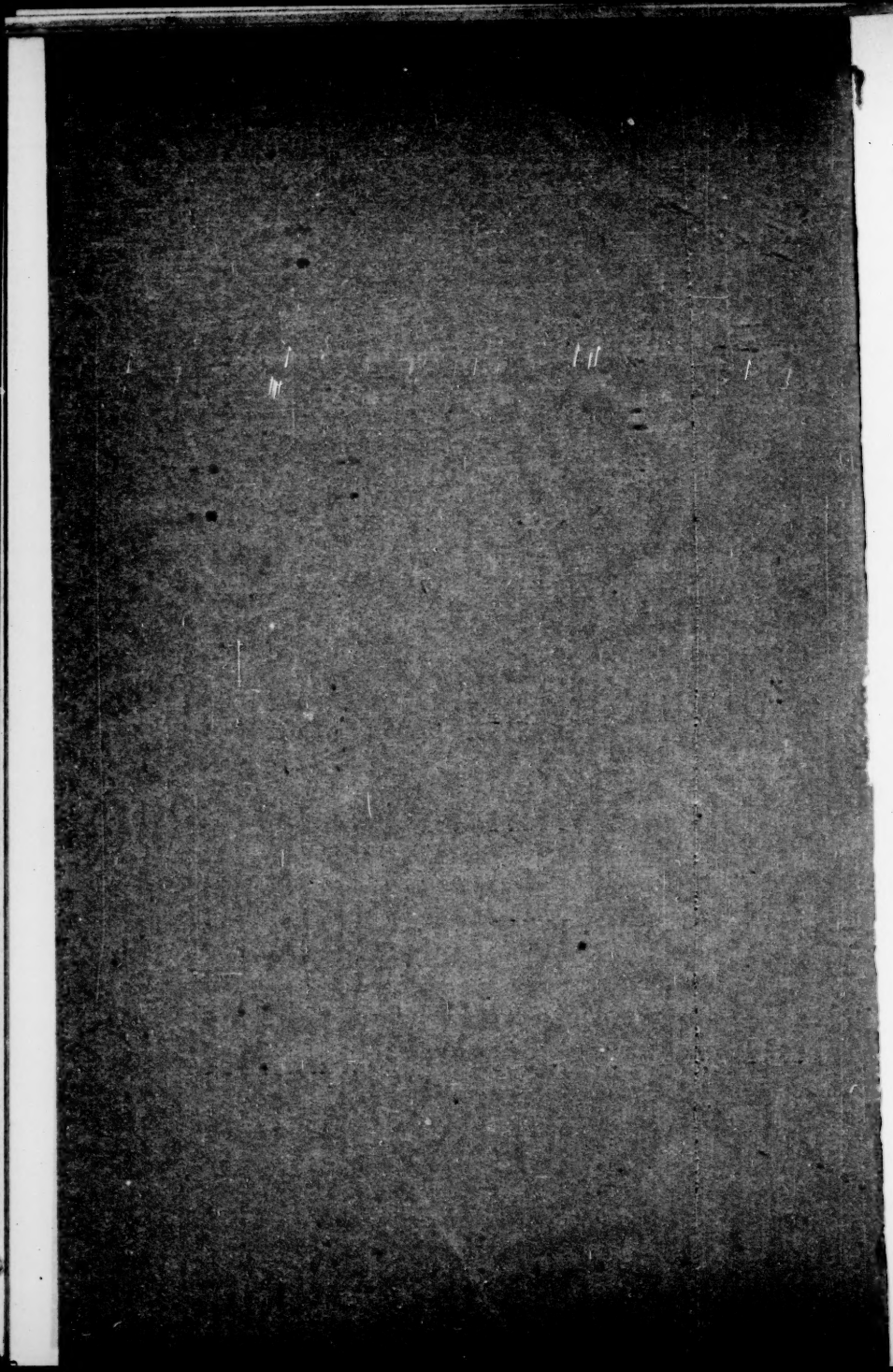
vs.
WILLIAM WINDOM, SECRETARY OF the Treasury.
} No. 1301.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.



Supreme Court of the United States.

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UNITED STATES EX REL. AMASA A. Redfield, plaintiff in error,
vs.
WILLIAM WINDOM, SECRETARY OF the Treasury.
} No. 1301.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an application for a mandamus made under the following circumstances:

In the year 1866 a certain William Mitchell contracted with the United States to construct and repair seven houses on the coast of Long

Island, New York, for the use of the Life-Saving Service.

Mitchell having performed the work and labor called for by the contract, the accounting officers of the Treasury found that there was due him, under the contract, the amount of $12,536.

For this amount a draft was drawn at the Treasury and sent to George W. Moore, who was superintendent of construction of life-saving stations, Atlantic and lake coasts, on February 15, 1888, to be delivered to Mitchell, however, on the condition only that he should pay what was due the various mechanics and material men whose labor and materials had been used by Mitchell in the performance of the contract, and who had filed their claims in the Treasury. The aggregate of these claims was $12,503.29 (R., pp 34, 37–40).

But Mitchell wholly failed to perform this condition, as he had agreed to do, and for this reason, and the further one, that he owed the United States penalties, incurred by his defaults under the contract, to the aggregate sum of $6,240, but which would have been forgiven him if he had

kept his promise, the Secretary of the Treasury, Mr. Windom, refused to deliver him the draft.

The failure of Mitchell to keep faith with the Secretary of the Treasury with regard to the mechanics and material men was, perhaps, due to to his embarrassed condition, for, as the record shows (pp. 6–9), certain proceedings supplementary to execution were taken against him in the supreme court of the city and county of New York, on February 27, 1888, by Patterson Brothers, judgment creditors of his, the result of which was the appointment of the relator, Redfield, as receiver, and the assignment to him by Mitchell of the draft now in controversy as well as all sums due him by the Government under an order of the court.

As the result of the refusal of the Secretary of the Treasury to deliver the draft to Mitchell, or the receiver, Redfield, a mandamus was applied for December 23, 1889, to compel him to do so.

THE PLEADINGS.

The ground taken in the petition (R., pp. 1–5) is, that after the adjustment of Mitchell's account, the duties to issue a warrant authorizing the payment of the sum found due and a draft paying it were purely ministerial (par. 5), that the conditions prescribed by the Secretary for the delivery of the draft were unlawful and an unwarrantable interference with the private affairs of the contractor, Mitchell (par. 6), and that the amount found due by the accounting officers is absolutely correct (par. 9).

It is averred that the assignment by Mitchell to the receiver, Redfield, was executed after the issuing of the draft and is valid under the laws of the United States (pars. 13, 14).

It is, then, averred that the Secretary's refusal to deliver the draft was arbitrary, and that mandamus is the only remedy open to the relator (par. 17).

AMENDMENTS OF THE PETITION.

On January 17, 1890, the petition was amended by adding the averment that prior to the making of the contract Congress had made an appropriation for the building and repairing life-saving stations, and that there is sufficient money in the Treasury applicable to the payment of what is due under the contract. (Rec., p. 13.)

On June 9, 1890, the petition was again amended by adding averments purporting to detail what the Secretary had said with reference to the above-stated agreement that the account of Mitchell should be adjusted without regard to the penalty incurred, and the draft for its payment delivered to him on condition that he would pay what was due the mechanics and material men. These averments are accompanied with a denial that any such agreement was made. (Rec., pp. 25–27.)

THE SECRETARY'S RETURN TO THE RULE TO SHOW CAUSE.

The Secretary's return was filed June 26, 1890 (R., pp. 40–44).

Omitting any unnecessary reference to the uncontroverted facts of the case, the return of the Secretary may be stated substantially as follows:

He admits the adjustment of the account, as stated in the petition, but avers that he is informed and believes that the adjustment of the account and preparation of the draft for delivery were on the conditions already stated, and denies that the draft is dated as the petition alleges. (Par. 4.)

He denies that the duty devolved on him is ministerial and admits the appropriation by Congress for life-saving stations, etc. (Par. 5.)

He avers that he has discretion as to the delivery of the draft (par. 6), and denies that his refusal to deliver it is arbitrary (par. 7).

Says he has no knowledge as to the claims mentioned in paragraph 8, but "avers upon information and belief that they are for work and

materials used in the work done under the contract in question." (Par. 8.)

Says he is informed and believes the said amount of $12,536 is not justly due and avers, on information and belief, that a correct statement of the account should embrace the penalties and forfeitures or an amount as damages, and would show that much less is due than the amount claimed. (Par. 9.)

He denies that the assignment has the effect claimed for it, or that it describes the draft correctly. (Par. 12.)

He avers, on information and belief, that but for the said understanding as to the said claims the draft would not have been drawn for the amount expressed therein; that the draft was not prepared for unqualified delivery, and that it was especially agreed that the draft should be sent to Captain Moore, and that he should be charged with the duty of seeing to the payment of said claims. (Par. 15.)

He denies that he has defied the law, and avers that he believes the court will not interfere with his administrative policy. (Par. 16.)

He denies that relator is without remedy at law, and avers that he has an adequate and complete remedy in the Court of Claims.

He avers, on information and belief, that Mitchell incurred penalties under the contract to the amount of $6,240, which should be deducted from said draft, and that, for that purpose, the amount should be restated, and that to leave the relator to his remedy at law would give the Government an opportunity to avail itself of said forfeitures or other just damages; and he further avers that he is informed and believes that Mitchell, by various contrivances, assignments, and preferences, some of which are being litigated as fraudulent, has sought to deprive the said workmen and material men of their just dues, and that he conceives it to be his duty as Secretary of the Treasury "to consider the equitable and just claims of persons of whose property the Government has become the beneficiary: and to pursue such course, either by suggestion as to legislation or otherwise, as may be necessary to subserve the ends of justice." (Par. 18.)

Upon this presentation the court denied the writ (p. 45), for the reason stated in its opinion (pp. 46, 47).

ARGUMENT.

THERE IS A PLAIN AND ADEQUATE REMEDY AT LAW.

The relator's demand, being founded on a contract with the United States, falls clearly within the jurisdiction of the Court of Claims, as defined in section 1059, Revised Statutes.

A judgment of that court against the United States would give the relator the same relief as he asks now, for such a judgment would give him his money. Why, then, should not the well-established principle, that mandamus will not lie where there is adequate relief at law, be applicable to this case?

In *The People* v. *Thomson* (25 Barb., 73) the court went so far as to hold that mandamus would not lie to compel payment of the salary of an officer of a municipal corporation because, as the court say, "the relator has a complete and adequate remedy by action."

It is not claimed that the right to sue for damages the officer refusing to perform a ministerial duty is an adequate remedy at law to bar the right to a mandamus. The doctrine on this subject is satisfactorily stated in the following cases,

Comm. v. *Johnson*, 2 Binn., 279.

Apgar v. *Trustees*, and 34 N. J. (Law), 308.

State v. *Holliday*, 3 Halst., 205.

It may be admitted that, if Congress had made a specific appropriation for this demand and payment had been refused at the Treasury, mandamus would lie, but that would be on the principle that Congress having set apart the money to pay the particular demand, the Government would be in no default, but the default would be with the officer whose duty, under the law, it was to pay over the money. In such a case no suit would lie in the Court of Claims, it would seem, for Congress has forestalled such a suit by providing the money for the particular debt by a special appropriation.

An appropriation by Congress to meet a particular demand without suit in the Court of Claims is of the same force and effect as an ap-

propriation to pay a judgment of that court. In either case a refusal at the Treasury to pay the money appropriated could be compelled by mandamus, otherwise the public creditor might be no better off with an appropriation by Congress for his benefit than without.

It is upon this ground that mandamus is the appropriate remedy to compel payment of the salaries of public officers, the right to sue the officer withholding payment for damages being justly considered no adequate remedy.

Said the supreme court of Alabama in *Nichols* v. *The Comptroller* (4 Stew. and Porter, 157):

> In the case under consideration, it was contended that the architect had another remedy, known to the law, which was a suit against the State. But, we apprehend, where the demand is for a quarter's salary, fixed and appropriated by law, and made payable quarter annually, at the Treasury, that a suit could not be sustained against the State. Because, in all such cases, it is the duty of the comptroller to grant his warrant on the Treasury—*no suit or judgment against the State, could better ascertain the amount due, or confer a better right than the appropriation already made by law.* It is conceded that no money can be drawn from the Treasury, but in pursuance of an appropriation made by law, but it is not necessary, that there should be an act passed annually, for the appropriation; if there is a general law fixing the salary, requiring it to be paid at the Treasury, annually or quarter annually, this is sufficient.

But in the case at bar there is no special appropriation for this particular demand and there is no ground for saying that the general appropria-

tion for life-saving purposes, made before the contract with Mitchell was entered into, was a legislative sanction of it. No department of the Government has sanctioned the claim; on the contrary, the Executive Department, through the head of the Treasury, has refused to pay it. It is a case, then, where *the Government itself*, and not merely one or more of its officers, has refused to pay, and therefore a suit to force payment should be directed against the Government in the Court of Claims and not against one of its officers in the supreme court of this District, for if there is a default it is the default of the Government alone.

Before a public officer can be subjected to a mandamus it must appear that the Government, whose servant he is, has required him to do the thing which the relator is seeking to compel him to do. But if his Government has not so required him, then there must be a judicial investigation into the whole matter, in a proper suit, to determine whether the officer has exercised a legal discretion or a merely arbitrary one, and a

judgment rendered before the officer can be placed in the wrong and made liable to a mandamus.

In this case, then, it can not be said that the Secretary of the Treasury is under any duty to the relator until the Court of Claims shall have adjudged that, under all the circumstances, the United States is under a legal obligation to pay the relator the amount of the draft.

THE SECRETARY OF THE TREASURY HAS A DISCRETION IN THE MATTER WHICH CAN NOT BE CONTROLLED BY MANDAMUS.

It is going very far to say that after Mitchell had failed to perform the condition on which his account was stated, the Secretary had not the right to withhold the draft from him with a view to laying the matter before the proper accounting officers for a readjustment of the account, with a view to a deduction of the penalties and the claims of the mechanics and material men, when the latter should be judicially ascertained.

Section 191, Revised Statutes, which makes the balances stated by the accounting officers

conclusive on the Executive Department, expressly provides for just such action as the Secretary took in this case, for it provides that the head of any department may "*submit to such Comptroller any facts in his judgment affecting the correctness of such balance*, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

The right of the Government to the full penalties incurred by Mitchell under the contract would seem undeniable. (*Clark* v. *Barnard*, 108 U. S., 437.)

The duty of the Secretary of the Treasury to protect the mechanics and material men would seem to be clear also.

The buildings repaired and erected under the contract were not on land over which the United States had acquired jurisdiction, but were placed on the coast of Long Island on land subject to the jurisdiction of the State of New York; and were just as much liable to the liens of mechanics, under the State law, as any other buildings.

It is true that such liens could not be enforced against the Government buildings by the usual

proceedings in the State courts, but, we apprehend, that that is no reason for holding that there are no liens on the property and that the Government is under no obligation to protect its property and its honor by requiring the contractor to satisfy the claims for labor and materials. The obligation of the Government in such cases is, if anything, a higher obligation, for the very reason that it can not be sued.

If the Secretary of the Treasury had delivered the draft to Mitchell, with notice of the claims, and he had failed to pay them, would it not have been the duty of Congress to pay them? Could the Government, with decency, take the benefit of the labor and materials without paying the people whom it had enabled the contractor to cheat? It can not be supposed that the writ of mandamus can be used for so immoral a purpose as compelling the payment of money under such circumstances.

The liens of mechanics and material men have the sanction of natural justice, are enforced everywhere by statute, and no Government can ignore them that has a just regard for its honor.

This court has decided, on full consideration, that property owned by the Government may become affected by liens like any other property. The case of *The Siren* (7 Wall, 152) establishes this. In that case a vessel, taken on the high seas as a prize of war, collided with another vessel while being brought into the port of Boston for adjudication in a prize court. She was condemned as a prize and sold and the owners of the damaged vessel intervened in the prize court with a claim for damages, which this court allowed and directed to be paid out of the proceeds of the sale, proceeding on the principle that the vessel in fault was none the less subjected to the lien of the general admiralty law because it was the property of the United States. The court said:

> For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such cases the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, can not be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and unavailable for any purpose (p. 155).
>
> * * *

The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. Thus if the Government, having the title to land subject to the mortgage of the previous owner, should transfer the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the Government.

So if the property belonging to the Government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the Government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors (pp. 158, 159).

To say, then, that the Secretary has no discretion as to the delivery of the draft, is to say that the law compelled him to disregard these mechanics' liens, and put it in the power of the contractor to defraud the holders of them and thereby place the Government under a duty to pay twice for the same things.

It is a misconception of the motives of the Secretary to say that he arbitrarily attempted to meddle in the private business of the contractor by imposing the condition that the mechanics' liens should be paid by him before the draft

should be delivered. It was not with any such view that he acted, but with the view of protecting the Government property by requiring the lawful claims and charges on that property to be paid, and it is surprising that the court below should have animadverted on the course taken by the Secretary in the performance of this plain public duty.

The Secretary has not assumed to adjudicate upon the claims of these lien holders, for he says in his return that "the respondent conceives it to be within the purview of his authority as Secretary of the Treasury to consider the equitable and just claims of persons of whose property the Government has become the beneficiary, and to pursue such course, either by suggestion as to legislation or otherwise, as may be necessary to subserve the ends of justice." (Rec., p. 43.)

Evidently the Secretary's purpose was to hold on to the money in order to give the lien holders an opportunity to take judicial proceedings against the contractor and the receiver for the purpose of having the amounts of their claims and all questions between them and the receiver,

the relator, reduced to judgment. In his inability as an executive officer to deal with judicial questions it was his duty to refer the parties to the judicial department for a settlement of their rights to the money in his hands. And there can be no doubt that the Secretary is fully borne out by the practice of his predecessors in cases of this kind.

There is, besides, a special reason in this case for the course taken by the Secretary, for the record shows that the contractor Mitchell is insolvent and, therefore, that the only hope of satisfaction for the lien holders is in the Secretary's holding on to the fund until the rights to it are settled in court.

This practice of the Treasury Department has received the sanction of this court repeatedly.

Milnor v. *Metz*, 16 Pet, 221.

Phelps v. *McDonald*, 99 U. S., 307.

White v. *Bayard*, 127 U. S., 246.

Porter v. *White*, 127 U. S., 235.

Spain v. *Hamilton*, 1 Wall., 604.

In *Phelps* v. *McDonald* (*supra*), the court say, referring to another case, "The Secretary refused

to recognize the claim of either party, and *left them to adjust the conflict by a judicial determination.*"

By making the Treasury the stakeholder of a fund in controversy, the *res* is kept secure for the party or parties to whom it shall be adjudged, and it is not seen that any objection can exist to a practice so manifestly in the interests of justice.

It is, furthermore, to be noted that what holds good with reference to money in which the Government has no interest, as in the cases cited, must hold good with reference to cases, like the one at bar, where the Government has a direct interest in the proper payment of the money.

APPLICATIONS FOR MANDAMUS ARE ADDRESSED TO THE SOUND DISCRETION OF THE COURT.

The right to a mandamus is not *ex debito justitiæ*, and it does not follow that the writ will be granted even though it appear that the duty sought to be performed is purely ministerial, for this writ, like the writ of injunction, is controlled by the discretion of the court. If, therefore, the

right to the writ is doubtful, or "if the granting of it would be attended with manifest hardship and difficulties," etc., it will be refused. (*Van Rensselaer* v. *Sheriff of Albany*, 1 Cow., 512.).

Said this court, in *Life and Fire Insurance Company* v. *Wilson* (8 Pet, 302): "The writ of *mandamus* is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right."

Said Chief-Justice Gibson, in *Comm.* v. *Canal Commrs.* (2 Pen. and Watts, 518): "Although demandable of common right, it [the writ of *mandamus*] is truly said to be grantable at discretion; for an indiscriminate use of it would certainly lead to its abolition." See also High, Ext. Rem., sec. 9, and cases cited.

In *People* v. *Forquer*, Breese, p. 68, the court use the following language:

> If the right had been established as a perfect legal right, and it has been violated, our laws must afford a remedy. But in the case of a *mandamus* there are cases where this may have been shewn, yet the court will not grant the writ. *It is certainly a sound legal principle, that cases may arise where the court will not grant a mandamus, when the granting thereof will, in a collateral manner, decide questions of importance between persons who are not parties to the proceedings, and have had no notice and opportunity to interpose their defence: or where it will be attended with manifest hardships and difficulties.* (p. 82.)

In *Oakes* v. *Hill* (8 Pick., 47), the court said "they had come to the conclusion that it was not proper to issue a *mandamus*." They remarked, "that an action was pending in which the same questions might be tried, and *that a determination on this summary process might affect the rights of persons who had no opportunity to be heard.*"

When the case was before the court below, on demurrer the court, after holding that a proper case was made in the petition to authorize the issuing of a rule to show cause, used the following language:

> In connection with this part of the case it is proper to state that we do not decide that there are no circumstances in which the Secretary of the Treasury can have a discretion to refuse payment, even when the proceedings have reached the stage shown in this case. If such grounds of discretion exist they may yet be shown in the return. On this point we may refer to an observation of Lord Denman in Rex *vs.* The Lord's Commissioners, *supra*: "If, as has been suggested," said his lordship, "it should on any occasion be unsafe, with reference to the public service, to make a payment of this kind, the fact may be stated on return to the mandamus." (4 Adol. and Ellis, 295.)

After the Secretary's return to the rule, the court, in denying the writ, said:

> A return has now been made. It states in effect that the contractor was liable by his contract to a penalty of $30 per day for any default in completing the work within the time stipulated; that he had actually incurred penalties for delays

to the amount of $6,240, and that the enforcement of these penalties, by deducting them from the amount of his account, was only waived conditionally--that is to say, on the condition that the relator should allow the disbursing officer to whom the draft was sent to pay the subcontractors and workmen out of the proceeds of the draft. It is claimed in the return that the conditions of the proposed waiver were not complied with by the relator and that there has been no absolute waiver.

* * * * *

We think that this return is conclusive of our action in this case. It alleges that there has never been an absolute waiver of the penalties incurred by relator's assignor, and that respondent is now charged with the executive duty of enforcing and has the purpose to enforce those penalties, and that it is his executive duty not to pay the amount found to be due only on the condition that such penalties should be waived.

In view, now, of these authorities, does it not seem plain that the case at bar is one in which this court should deny the writ even though it should appear that the duty of the Secretary of the Treasury is purely ministerial?

The inevitable result of granting the writ would be to take away the only possible effectual remedy that the lienholders possess, because the contractor, their debtor, is *insolvent*, and that, too, in a summary proceeding where they are not, and could not be, parties. It is difficult to imagine a stronger case for the exercise of the sound discretion lodged in the court by the law.

The Secretary says that it is necessary for the protection of the lienholders and the United

States, which is entitled to a large amount of penalties under the contract, that the draft should be withheld, and these statements are made in a return the facts set forth in which can not be controverted in this proceeding.

It is true the Secretary does not state all these facts of his own knowledge, because they took place in the course of a preceding administration, but he does state them on information and belief, derived from official sources, and what he believes the court will believe for the purposes of this proceeding.

When this high official states, under oath, that he believes the consequences of a delivery of the draft will be of the serious character mentioned in the return, and that "it satisfactorily appears from information furnished the Treasury Department, and he avers upon information and belief, that said Mitchell by various contrivances, assignments, and preferences, some of which are being litigated as fraudulent, sought to deprive of their just dues the workmen and material men, whose work and materials have been used in the execution of said contract, and respondent conceives

it to be within the purview of his authority, as Secretary of the Treasury, to consider the equitable and just claims of persons, of whose property the Government has become the beneficiary, and to pursue such course, either by suggestion as to legislation or otherwise, as may be necessary to subserve the ends of justice" (Rec., p. 43), it would seem to be sufficient to induce this court to determine that it will not allow the writ to issue "where it will be attended with manifest hardships and difficulties."

And this is especially so in a case like this, where the law provides another and a better remedy in the Court of Claims, where all the questions involved may be litigated. Indeed, the fact that there is such better remedy would seem to be absolutely controlling, for the denial of the writ can not do any possible harm, while it may avert serious "hardships and difficulties." The law on this subject is very forcibly stated by the Supreme Court of Arkansas in *Danley* v *Whiteley* (14 Ark., 687), where Chief Justice Watkins says:

> It is a question of some difficulty whether the submission of the State to be sued by her creditors, affords an adequate remedy superseding the summary and specific one sought to be

obtained by mandamus. The suit permitted against the State is in the nature of an appeal from the adverse decision of the Auditor, and must be an ordinary suit in form, and in substance a direct proceeding against the State by name. It was not designed to make the writ of mandamus a substitute for the action of debt or assumpsit, or a bill for an account. Here the specific relief asked for is the issuance of the Auditor's warrant, the direct fruits of which may be to enable the relator to realize a mere money demand from the treasury; so that the difficulty suggested is forcibly presented.

Our opinion is, that although the privilege of suing the State ought to influence the court in refusing to award the writ in all cases where it may be doubtful whether the officer or inferior magistrate has a discretion or acts ministerially, yet it does not take away the remedy where the distinction is clear, and the act to be done is purely ministerial, a duty enjoined by law, which the relator has a right to demand, though by the performance of it the interests of the State may be remotely or consequentially affected. Because upon principle, and unless this be so, the Auditor could withhold the regular salary of any public officer; he could defeat the execution of the laws, by refusing to obey the requisition of the governor upon the contingent fund; and by disregarding the certificate of the proper officer of either house, he might force members of the general assembly to bring suits against the State for their per diem and mileage (p. 701).

It is respectfully submitted that there appears to be sufficient in the record to warrant the court in affirming the judgment.

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